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No. 13764

United States
Court of Appeals
For the Ninth Circuit.

ROY EDWARD HEGG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Southern Division.

FILED

MAY 15 1953

PAUL P. O'BRIEN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court in and for the
Southern District of California, Southern
Division

No. 22124 SD

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

ROY EDWARD HEGG,

Defendant.

INDICTMENT

[U.S.C. Title 18, Sections 371, 201 and 1006—
Conspiracy; Bribery of Government Officer; De-
frauding Savings and Loan Association]

The grand jury charges:

Count One

[U.S.C. Title 18, Sections 371 and 201]

I.

A. That during the calendar years 1950 and 1951, the defendant, Roy Edward Hegg, was an officer, namely, President, and a Director of the San Diego Federal Savings and Loan Association in San Diego, California.

B. That during said period, the unindicted co-conspirator Alton Bookman Jackson was an officer of the San Diego Federal Savings and Loan Association, to wit: Vice-President and Treasurer.

C. That during said period, the San Diego Federal Savings and Loan Association was a savings and loan association authorized and acting under the laws of the United States.

D. That during said period, the unindicted co-conspirator Francis Gilbert Paige was an officer, employee, and person, acting for and on behalf of the United States, namely: Assistant Loan Guaranty Officer of the Loan Guaranty Division of the Veterans Administration Regional Office, San Diego, California:

1. In his aforesaid capacity, the said Francis Gilbert Paige had numerous questions, matters, causes, and proceedings pending before him, and which might by law be brought before him, and in performing his said official duties, said [2*] Francis Gilbert Paige had the power to make various decisions, among which were the following:

(a) To determine the order in which Reports of Loans Processed on Automatic Basis (VA Form 4-1820) and Applications for Home Loan Guaranty (VA Form 4-1802) would be processed in the Loan Guaranty Division of the Veterans Administration Regional Office, San Diego, California; that is to say, to determine whether or not said loan reports and loan applications should be processed on a "first-in-first-out basis," or whether or not loan applications and loan reports originating with particular lenders should receive preference over those originating from other lenders.

(b) To determine whether or not the credit status of particular veterans for whom applications for loans to be processed justified loan

*Page numbering appearing at foot of page of original Certified Transcript of Record.

guaranties, under the applicable Veterans Administration rules and regulations.

2. The said unindicted co-conspirator Francis Gilbert Paige, as Assistant Loan Guaranty Officer, had the legal duty to do certain acts, and to refrain from doing certain acts, among which were the following:

(a) It was his legal duty to insure that applications for guarantees, and reports of loans made to the Veterans Administration, be processed, as a general practice, in the order in which received in the office of the Loan Guaranty Division, and it was his legal duty to refrain from giving preference to any lender as to the order in which loan applications and reports were processed.

(b) It was his legal duty to exercise discretion in cases where the credit of veterans was of doubtful character, and to refuse to guarantee the loans of such veterans where the safety of the government's guaranty, or the welfare of the veterans, was imperiled by the loan; it was his legal duty to refrain from being influenced in his official decisions, by consideration other than [3] the welfare and protection of the veteran and the government.

II.

That commencing on or about September 29, 1950, and continuing up to and including June, 1951, in San Diego, California in the Southern Division of the Southern District of California, the defendant

Roy Edward Hegg, and his co-conspirators, Alton Bookman Jackson and Francis Gilbert Paige, not named as defendants herein, and other persons to the Grand Jury unknown, did, knowingly and wilfully, combine, conspire, confederate, and agree together, and with each other,

A. To defraud the United States of America, as follows:

1. To defraud the United States of America in the exercise of its governmental function of administering a program whereby eligible veterans of World War II were assisted in financing the purchase and construction of homes, through government guaranties of purchase and construction loans to said veterans, and

2. To defraud the United States of America of the honest, faithful, conscientious and disinterested services and functions of the unindicted co-conspirator Francis Gilbert Paige in the exercise of his official duties as Assistant Loan Guaranty Officer of the Loan Guaranty Division of the Veterans Administration Regional Office at San Diego, California, and

B. To commit offenses against the United States, in violation of Section 201 of Title 18 U.S.C., as follows:

1. Defendant Roy Edward Hegg, and his unindicted co-conspirator Alton Bookman Jackson would promise, offer, and give, money and things of value, and would cause the promising, offering and giving of money and things of value to Francis Gilbert Paige, an officer, employee, and person, acting for

and on behalf of the United States, namely, Assistant Loan Guaranty Officer of the Loan Guaranty Division of the Veterans Administration Regional Office, San Diego, California, and to Veterans Administration employees working under the direction of Francis Gilbert Paige, with the intent to influence the [4] decisions and actions of the said Francis Gilbert Paige, and of the said employees working under the direction of said Francis Gilbert Page, on questions, matters, causes and proceedings, which might at any time be pending, or which might by law be brought before the said Francis Gilbert Paige in his official capacity as Assistant Loan Guaranty Officer of the Loan Guaranty Division of the Veterans Administration Regional Office in San Diego, and before the said employees in their official capacities as Veterans Administration employees, and with intent to influence him to commit, and to aid in committing, and to collude, and to allow fraud, and to make the opportunity for the commission of fraud, on the United States, and to induce the said Francis Gilbert Paige, and the said Veterans Administration employees to do, and to omit from doing, various acts, in violation of his lawful duty as Assistant Loan Guaranty officer of the Loan Guaranty Division of the Veterans Administration Regional Office, San Diego and in violation of their lawful duties as Veteran Administration employees.

The said combination, conspiring and confederating being in violation of Title 18 U.S.C. Section 371.

III.

The objects of this conspiracy were to be accomplished as follows:

A. The defendant, Roy Edward Hegg, and his unindicted co-conspirator Alton Bookman Jackson, were to give, or cause one of them to give, or cause one of their employees or agents to give, cash payments in the sum of \$400 each to said Francis Gilbert Paige every month, commencing on or about September 29, 1950. Said cash payments were to be charged to an account designated "Special Loan Expense Account" of the San Diego Federal Savings and Loan Association. The unindicted co-conspirator Alton B. Jackson was to withdraw the amount of \$400 in cash from a teller at the San Diego Federal Savings and Loan Association substituting therefor a receipt signed by the unindicted co-conspirator Alton Bookman Jackson, and initialled by the defendant Roy Edward Hegg, and thereafter, the unindicted co-conspirator Alton Bookman Jackson would place the cash in an [5] envelope, in small denominations, addressed to Francis Gilbert Paige "Personal" and deliver the envelope to a messenger of San Diego Federal Savings and Loan Association, with instructions to give said envelope to Francis Gilbert Paige.

B. The payments of money as described above were to be promised, made, offered, and given, to said Francis Gilbert Paige and to various Veterans Administration employees working under the direction of said Francis Gilbert Paige, by the defendant, Roy Edward Hegg, and his unindicted co-

conspirator Alton Bookman Jackson, with the intent to influence the decision of said Francis Gilbert Paige, and the said Veterans Administration employees, in numerous questions, matters, causes and proceedings, which would be pending before the said Francis Gilbert Paige, and before said Veterans Administration employees, or which might by law be brought before the said Francis Gilbert Paige in his official capacity as Assistant Loan Guaranty Officer of the Veterans Administration Regional Office in San Diego, California, or before the said Veterans Administration employees and to influence the said Francis Gilbert Paige and the said Veterans Administration employees to commit, and aid in committing, and to collude, and allow numerous frauds, and to make opportunity for the commission of frauds on the United States, and to induce the said Francis Gilbert Paige and the said Veterans Administration employees to do, and omit to do, acts in violation of his and their lawful duty, as follows:

1. When the number of Applications for Home Loan Guarantee (VA Form 4-1802) and Reports of Loans Processed on Automatic Basis (VA Form 4-1820) received by the Loan Guaranty Division of the San Diego Veterans Administration Regional Office exceeded the number that could be processed by the personnel then working in the Loan Guaranty Division of the Veterans Administration Regional Office of San Diego and when, therefore, there developed a "backlog" of unprocessed loans in said Division, the said Francis Gilbert Paige was

to use his authority to cause the Applications for Home Loan Guarantee and the Reports of Home Loan Processed on Automatic Basis to be processed in an order other than that in which they were received in the office, and would cause such loan reports and applications as had been delivered to the Veterans Administration by and on behalf of the San Diego Federal [6] Savings and Loan Association to be processed shortly after they were received at the office of the Loan Guaranty Division of the San Diego Veterans Administration Regional Office, whether or not other Applications for Home Loan Guarantee and Reports of Home Loan Processed on Automatic Basis which had been submitted by or on behalf of other lenders had been waiting in said office for substantially longer periods of time. This preferential treatment was to be extended to substantially all Applications for Home Loan Guarantee and Reports of Home Loan Processed on Automatic Basis submitted by or on behalf of the San Diego Federal Savings and Loan Association.

2. The said Francis Gilbert Paige, when reviewing the applications for loan guarantee of veterans whose credit history and status made the granting of the applications in their cases questionable, or not possible, under local credit standards and under sound credit principles, would, without regard to said credit reports and history, or to said standards, or to said principles of sound credit administration, generally approve the applications of such veterans who were seeking loans from San

Diego Federal Savings and Loan Association, and the said Francis Gilbert Paige would not take into consideration the true credit status of such veterans, or the interest of the United States as guarantor of the loans, or the interest of the veterans, but would be guided primarily by the wishes and desires of the defendant Roy Edward Hegg, and his unindicted co-conspirator Alton Bookman Jackson.

IV.

To effect the objects of this conspiracy and in furtherance thereof, the defendant Roy Edward Hegg and his unindicted co-conspirators, committed divers overt acts, all of them within the Southern Division of the Southern District of California, among which were the following:

A. On or about September 20, 1950, the defendant Roy Edward Hegg, and his unindicted co-conspirators Alton Bookman Jackson and Francis Gilbert Paige, had a conversation in the coffee room of the [7] San Diego Federal Savings and Loan Association.

B. On or about September 29, 1950, the unindicted co-conspirator Alton Bookman Jackson withdrew \$400 in cash from the San Diego Federal Savings and Loan Association, and charged it to the "Special Loan Account."

C. On or about September 29, 1950, the defendant, Roy Edward Hegg, initialled a receipt for \$400.

D. On or about September 29, 1950, the unin-

dicted co-conspirator Alton Bookman Jackson placed \$400 in an envelope.

E. On or about September 29, 1950, the undicted co-conspirator Alton Bookman Jackson caused \$400 to be delivered to Francis Gilbert Paige, by giving the sealed envelope to a messenger working for San Diego Federal Savings and Loan Association.

F. On or about September 29, 1950, the said undicted co-conspirator Francis Gilbert Paige received an envelope containing \$400.

G. On or about October 3, 1950, the defendant, Roy Edward Hegg, caused the undicted co-conspirator Alton Bookman Jackson, and employees of San Diego Federal Savings and Loan Association, to deliver \$400 in cash to Francis Gilbert Paige.

H. On or about December 4, 1950, the defendant, Roy Edward Hegg, caused the undicted co-conspirator Alton Bookman Jackson, and employees of San Diego Federal Savings and Loan Association, to deliver \$400 in cash to Francis Gilbert Paige.

I. On or about January 2, 1951, the defendant, Roy Edward Hegg, caused the undicted co-conspirator Alton Bookman Jackson, and employees of San Diego Federal Savings and Loan Association, to deliver \$400 in cash to Francis Gilbert Paige.

J. On or about February 6, 1951, the defendant,

Roy Edward Hegg, caused the unindicted co-conspirator Alton Bookman Jackson, and employees of San Diego Federal Savings and Loan Association, to deliver \$400 in cash to Francis Gilbert Paige.

K. On or about October 31, 1950, the unindicted co-conspirator Francis Gilbert Paige approved and initialled the loan application of the veteran, in [8] the Veterans' Administration loan docket file numbered LH-12436-Calif.S.D.

L. On or about December 8, 1950, the unindicted co-conspirator Francis Gilbert Paige approved and initialled the loan application of the veteran in the Veterans Administration loan docket file numbered LH-11221-Calif.S.D.

M. On or about January 26, 1951, the unindicted co-conspirator Francis Gilbert Paige approved and initialled the loan application in the Veterans Administration loan docket file numbered LH-12697-Calif.S.D.

N. On or about September 29, 1950, the unindicted co-conspirator Francis Gilbert Paige gave \$40 to Lenora Hilliges, an employee of the Loan Guarantee Division of the Veterans Administration Regional Office, San Diego.

O. On or about October 3, 1950, the unindicted co-conspirator Francis Gilbert Paige gave \$40 to Lenora Hilliges, an employee of the Loan Guarantee Division of the Veterans Administration Regional Office, San Diego.

P. On or about December 4, 1950, the unindicted co-conspirator Francis Gilbert Paige gave \$40 to Lenora Hilliges, an employee of the Loan Guarantee Division of the Veterans Administration Regional Office, San Diego.

Q. On or about January 2, 1951, the unindicted co-conspirator Francis Gilbert Paige gave \$40 to Lenora Hilliges, an employee of the Loan Guarantee Division of the Veterans Administration Regional Office, San Diego. [9]

Count Two

[U.S.C. Title 18, Section 201]

1. That on or about September 29, 1950, in San Diego County, within the Southern Division of the Southern District of California, the defendant Roy Edward Hegg, promised, offered and gave, and caused to be promised, offered and given, money, in the sum of \$400 in cash, to an officer, employee, and person acting for and on behalf of the United States, namely: Francis Gilbert Paige, who was then and there the Assistant Loan Guaranty Officer of the Veterans Administration Regional Office in San Diego, California.

2. The acts of the defendant, Roy Edward Hegg, set forth in paragraph No. 1 of this count were done with the intent to influence the decisions and actions of the said Francis Gilbert Paige on questions, matters, causes, and proceedings, which were at that time pending, and which might be pending, and which might by law be brought before him in

his official capacity as Assistant Loan Guaranty Officer of the Veterans Administration Regional Office, San Diego, as follows:

(a) To influence the said Francis Gilbert Paige to give preferential treatment to, and to cause other employees of the Loan Guaranty Division of the Veterans Administration Regional Office in San Diego to give preference to the time and order of processing of Applications for Home Loans Guarantee (VA Form 4-1802) and Reports of Home Loans Processed on Automatic Basis (VA Form 4-1820), which had been or might be forwarded to the Veterans Administration by or on behalf of the San Diego Federal Savings and Loan Association.

(b) To influence the decisions and actions of the said Francis Gilbert Paige so as to cause him to approve for loan guarantee the applications of veterans whose loans would not have been approved except for the conduct of the defendant as set forth in Paragraph No. 1 of this Count, because of their unsatisfactory credit status.

3. The acts of the defendant, Roy Edward Hegg, set forth in paragraph No. 1 of this Count were done with the intent to influence the said Francis Gilbert Paige, as Assistant Loan Guaranty Officer of the Veterans Administration [10] Regional Office, San Diego, California, to commit, and aid in committing, and to collude in, and to allow frauds on the United States, and to make opportunity for the commission of frauds on the United States, as follows:

(a) To defraud the United States of the faithful, disinterested and conscientious services of the said Francis Gilbert Paige as Assistant Loan Guaranty Officer of the Veterans Administration Regional Office, San Diego, California, and to likewise defraud the United States of the faithful, disinterested, and conscientious services of Veterans Administration employees working under the direction and supervision of the said Francis Gilbert Paige.

(b) To defraud the United States in the exercise of its governmental function of administering a program whereby eligible veterans of World War II could be assisted in the purchase of homes by having a portion of loans which they would obtain for the purchase of such homes guaranteed by the Government of the United States.

(c) To defraud the United States of America, by causing it to become a guarantor of loans which were incurred by veterans whose financial conditions were such that they were not justified in obtaining such credit.

4. The acts of the defendant, Roy Edward Hegg, as set forth in paragraph No. 1 of this Count, were done with the intent to induce the said Francis Gilbert Paige to commit acts in violation of his lawful duty, and to omit from doing acts which it was his lawful duty to perform as Assistant Loan Guaranty Officer of the Veterans Administration Regional Office, San Diego, California, as follows:

(a) To give preference to transactions of San

Diego Federal Savings and Loan Association with the Loan Guaranty Division of the Veterans Administration Regional Office, San Diego, over the transactions of other persons, and institutions.

(b) To approve the credit standing of veterans, who were applying for a guarantee by the Veterans Administration of their loans from the San Diego Federal Savings and Loan Association, without regard to sound credit, principles, or the interests of the United States Government as guarantor, but rather with regard to the interests of the defendant, Roy Edward Hegg. [11]

Count Three

[U.S.C., Title 18, Section 201]

1. That on or about October 3, 1950, in San Diego County, within the Southern Division of the Southern District of California, the defendant, Roy Edward Hegg, promised, offered and gave, and caused to be promised, offered and given, money, in the sum of \$400 in cash, to an officer, employee, and person acting for and on behalf of the United States, namely: Francis Gilbert Paige, who was then and there Assistant Loan Guaranty Officer of the Veterans Administration Regional Office, San Diego, California.

2. The Grand Jury herein realleges all of Paragraphs 2, 3 and 4 of Count Two of this Indictment, and incorporates them herein as if they were set forth in full. [12]

Count Four

[U.S.C., Title 18, Section 201]

1. That on or about December 4, 1950, in San Diego County, within the Southern Division of the Southern District of California, the defendant Roy Edward Hegg, promised, offered and gave, and caused to be promised, offered and given, money, in the sum of \$400 in cash, to an officer, employee, and person acting for and on behalf of the United States, namely: Francis Gilbert Paige, who was then and there Assistant Loan Guaranty Officer of the Veterans Administration Regional Office, San Diego, California.

2. The Grand Jury herein realleges all of Paragraphs 2, 3 and 4 of Count Two of this Indictment, and incorporates them herein as if they were set forth in full. [13]

Count Five

[U.S.C., Title 18, Section 201]

1. That on or about January 2, 1951, in San Diego County, within the Southern Division of the Southern District of California, the defendant Roy Edward Hegg, promised, offered and gave, and caused to be promised, offered and given, money, in the sum of \$400 in cash, to an officer, employee, and person acting for and on behalf of the United States, namely, Francis Gilbert Paige, who was then and there Assistant Loan Guaranty Officer of the Veterans Administration Regional Office, San Diego, California.

2. The Grand Jury herein realleges all of Paragraphs 2, 3, and 4 of Count Two of this Indictment, and incorporates them herein as if they were set forth in full. [14]

Count Six

[U.S.C., Title 18, Section 201]

1. That on or about February 6, 1951, in San Diego County, within the Southern Division of the Southern District of California, the defendant Roy Edward Hegg, promised, offered and gave, and caused to be promised, offered and given, money in the sum of \$400 in cash, to an officer, employee, and person acting for and on behalf of the United States, namely, Francis Gilbert Paige, who was then and there Assistant Loan Guaranty Officer of the Veterans Administration Regional Office, San Diego, California.

2. The Grand Jury herein realleges all of Paragraphs 2, 3 and 4 of Count Two of this Indictment, and incorporates them herein as if they were set forth in full. [15]

Count Seven

[U.S.C., Title 18, Sections 371 and 1006]

I.

A. At all times referred to in this indictment the defendant, Roy Edward Hegg, was an officer, namely, President and a Director of the San Diego Federal Savings and Loan Association.

B. That during the period from January 1, 1946, to July 3, 1951, the unindicted co-conspirator Alton

Bookman Jackson was an officer of the San Diego Federal Savings and Loan Association, namely, Vice-President and Treasurer.

C. That at all times herein alleged, the San Diego Federal Savings and Loan Association was a savings and loan association authorized and acting under the laws of the United States.

II.

Prior to the date of the first overt act herein alleged, and continuing to the date of the return of this indictment, in San Diego County, California, in the Southern Division of the Southern District of California, the defendant, Roy Edward Hegg, and his co-conspirator Alton Bookman Jackson, not named as a defendant herein, and other persons to the Grand Jury unknown, did, knowingly and wilfully, combine, conspire, confederate, and agree together, and with each other, to commit offenses against the United States, in violation of Section 1006 of Title 18, U.S.C., in that the defendant, Roy Edward Hegg, and the unindicted co-conspirator Alton Bookman Jackson, were to participate, share in, and receive, directly and indirectly, monies, property, and benefits, through the transactions, loans, commissions, contracts, and other acts of the San Diego Federal Savings and Loan Association, with the intent to defraud said savings and loan association.

III.

The objects of this conspiracy were to be accomplished as follows:

A. During all the period herein referred to, the defendant, Roy Edward Hegg, would own and operate, as the sole owner, an insurance business, under the fictitious name of the San Diego Insurance Agency, which insurance business would be engaged in brokering for, and selling, fire and other insurance upon realty within the State of California. [16]

B. The defendant, Roy Edward Hegg, and the unindicted co-conspirator Alton Bookman Jackson, and other persons to the Grand Jury unknown, with the intent to defraud the San Diego Federal Savings and Loan Association of the faithful, conscientious and disinterested services of the defendant, Roy Edward Hegg, as its President and Director, and of the unindicted co-conspirator, Alton Bookman Jackson, as its Vice-President and Treasurer, were to demand and require as a condition precedent to the San Diego Federal Savings and Loan Association making, or committing itself to the making of a loan to any person, firm, institution or corporation on any new construction or tract, that such individual, firm, institution or corporation be required to place all fire insurance upon all property securing said loans solely through the defendant, Roy Edward Hegg, doing business as the San Diego Insurance Agency, and said co-conspirators were to require that any renewals of any such insurance therefore placed upon any such property be placed through the defendant, Roy Edward Hegg, doing business as the San Diego Insurance Agency.

C. The said co-conspirators were to thus cause the defendant, Roy Edward Hegg, to receive the commissions on the insurance premiums to be paid for fire insurance, and other insurance, which the co-conspirators would thus cause to be placed upon property securing loans made by the San Diego Federal Savings and Loan Association.

D. The defendant, Roy Edward Hegg, and his unindicted co-conspirators were to use their office, influence and power to cause the San Diego Federal Savings and Loan Association to make loans only to such borrowers as would agree to buy insurance from the defendant, Roy Edward Hegg, doing business as the San Diego Insurance Agency and the said co-conspirators were to refuse to make loans to applicants who would not so agree; and this would be done whether or not the best interest of the San Diego Federal Savings and Loan Association would have been served by lending to some of those applicants who would not agree to so place their insurance or to refuse to make loans to some of those borrowers, to whom loans were made, as a result of their agreement to place their insurance with the defendant, Roy Edward Hegg, doing business as the San Diego Insurance Agency, even though it was the duty of the defendant, Roy Edward Hegg, as President of the [17] San Diego Federal Savings and Loan Association to assure that loans were made by the said association solely with the best interest of said association in mind and without regard to interest of the defendant, Roy Edward Hegg, or any other person or persons.

IV.

To effect the objects of this conspiracy, and in furtherance thereof, the defendant, Roy Edward Hegg, and his unindicted co-conspirators, committed divers overt acts, all of them within the Southern Division of the Southern District of California, among which were the following:

A. That on or about May 2, 1950, in the City of San Diego, California, the defendant, Roy Edward Hegg, signed a letter addressed to the Hubner Building Company of 4108 University Avenue, San Diego, California, which letter, among other things, contained a paragraph as follows:

“This commitment is also based upon the fact that all fire insurance will be placed through the San Diego Insurance Agency, and the policies for fire insurance will be written for the full amount of the G. I. appraisal of the improvements for a period of not less than 3 years.”

B. That during the month of June, 1950, in the City of San Diego, California, the defendant, Roy Edward Hegg, held a conversation with Alton Bookman Jackson, wherein, and among other things, the said defendant Hegg directed the co-conspirator Jackson to prepare, and cause to be sent, a letter to the California Realty and Loan Company, Inc., a California corporation, then located in San Diego, California.

C. That on or about June 28, 1950, in the City of San Diego, California, at the direction of the

defendant, Roy Edward Hegg, the co-conspirator Alton Bookman Jackson did make, and cause to be sent to the California Realty and Loan Company, Inc., of San Diego, California, a written document, which written document did, among other things, contain the following paragraph:

“You will not solicit or write as agent or otherwise, fire and casualty insurance on any property securing the loans which are assigned to you by us or mortgage life insurance on the lives [18] of persons owning such property. All inquiries concerning or applications for such insurance shall be referred to R. E. Hegg, d.b.a. San Diego Insurance Agency.”

D. On or about July 26, 1950, defendant, Roy Edward Hegg, received a check in the sum of \$3,798.98, from the San Diego Federal Savings and Loan Association, check No. 116824, said check being made payable to the San Diego Insurance Agency.

E. On or about September 16, 1950, defendant, Roy Edward Hegg, received a check in the sum of \$5,332.95, from the San Diego Federal Savings and Loan Association, check No. 118167, said check being made payable to the San Diego Insurance Agency.

F. On or about September 21, 1950, defendant, Roy Edward Hegg, received a check in the sum of \$2,110.85, from the San Diego Federal Savings and Loan Association, check No. 118295, said check be-

ing made payable to the San Diego Insurance Agency.

G. On or about September 22, 1950, defendant, Roy Edward Hegg, received a check in the sum of \$2,169.30, from the San Diego Federal Savings and Loan Association, check No. 118343, said check being made payable to the San Diego Insurance Agency.

H. On or about September 22, 1950, defendant, Roy Edward Hegg, received a check in the sum of \$1,039.50, from the San Diego Federal Savings and Loan Association, check No. 118348, said check being made payable to the San Diego Insurance Agency.

I. On or about October 26, 1950, defendant, Roy Edward Hegg, received a check in the sum of \$4,926.60, from the San Diego Federal Savings and Loan Association, check No. 119065, said check being made payable to the San Diego Insurance Agency.

J. On or about April 24, 1951, defendant, Roy Edward Hegg, received a check in the sum of \$6,385.57, from the San Diego Federal Savings and Loan Association, check No. 123666, said check being made payable to the San Diego Insurance Agency. [19]

Count Eight

[U.S.C. Title 18, Section 1006]

That after February 1, 1950, and prior to the date of the return of this indictment, in San Diego

County, within the Southern Division of the Southern District of California, the defendant, Roy Edward Hegg, being an officer, to wit: President, of the San Diego Federal Savings and Loan Association, a savings and loan association authorized and acting under the laws of the United States with intent to defraud said association of his own honest, faithful, conscientious, and disinterested services and functions, participated, shared in, and received, directly and indirectly, money, profit, property, and benefits, through various transactions, loans, contracts, and other acts of said association.

A. The said participation, sharing in and receipt of money, profit, property, and benefits was accomplished in the following manner:

1. The Hubner Building Company, a partnership, was engaged in the construction of houses for sale to qualified veterans, under the terms of the Servicemen's Readjustment Act of 1944, as amended. The said Hubner Building Company desired to get a commitment from some lending institution that such lending institution would lend money to the said Hubner Building Co. and to the said qualified veteran purchasers, to finance the construction and purchase of approximately 1200 of such houses.

2. The said Hubner Building Company applied to the said San Diego Federal Savings and Loan Association for a commitment to make such loans. The defendant, Roy Edward Hegg, as President of said San Diego Federal Savings and Loan Asso-

ciation agreed to commit the said association to make said loans but the defendant, Roy Edward Hegg, required, as an essential condition to his committing the said association to the making of said loans, that the Hubner Building Company agree that all fire insurance placed on the said houses by either the said Hubner Building Company or the said veteran purchasers would be purchased through the defendant, Roy Edward Hegg, doing business as the San Diego Insurance [20] Agency, and the said defendant, Roy Edward Hegg, would not have so committed the said Association nor permitted any other officer, employee or agent of the said association to so commit the said association unless the said Hubner Building Company had so agreed to place, or to see to it that the said veteran purchasers placed all such fire insurance through the defendant, Roy Edward Hegg, doing business as the San Diego Insurance Agency. The defendant, Roy Edward Hegg, thereby considered his own welfare and interest in the receipt of commissions on premiums on fire insurance to be sold by him as one of the primary factors in determining whether or not to make a loan commitment to the said Hubner Building Company for and on behalf of said association, rather than considering only those factors affecting the best interest of the said association as was his duty as President of said association, in fraud of said association.

Pursuant to the said commitment, the said San Diego Federal Savings and Loan Association made

approximately 1277 of such loans on such houses. In every instance, pursuant to said agreement, the fire insurance on such houses was purchased through the defendant, Roy Edward Hegg, doing business as the San Diego Insurance Agency and the total of commissions received by the said defendant, Roy Edward Hegg, on said premiums was approximately \$19,253.59. [21]

Count Nine

[U.S.C. Title 18, Section 1006]

That after February 1, 1950, and prior to the date of the return of this Indictment, in San Diego County, within the Southern Division of the Southern District of California, the defendant, Roy Edward Hegg, being an officer, to wit: President of the San Diego Federal Savings and Loan Association, a savings and loan association authorized and acting under the laws of the United States, with intent to defraud said association of his honest, faithful, conscientious, and disinterested services and functions, participated, shared in, and received, directly and indirectly, money, profit, property, and benefits, through various transactions, loans, contracts, and other acts of said association.

The said participation, sharing in, and receipt of money, profit, property, and benefits was accomplished in the following manner:

The defendant, Roy Edward Hegg, caused the San Diego Federal Savings and Loan Association to enter into a contract with the California Realty

and Loan Co., Inc., a California Corporation, wherein the San Diego Federal Savings and Loan Association transferred to the California Realty and Loan Co., Inc., the right to service all or substantially all of the loans sold by San Diego Federal Savings and Loan Association to the Federal National Mortgage Association and the said defendant, Roy Edward Hegg, caused the San Diego Federal Savings and Loan Association to require as a necessary condition of said contract that the California Realty and Loan Co., Inc., agree that all renewals on fire insurance on said loans would be placed with the defendant, Roy Edward Hegg, doing business as the San Diego Insurance Agency, and the defendant, Roy Edward Hegg, would not have permitted the San Diego Federal Savings and Loan Association, nor any of its officers, employees or agents to enter into said contract unless the said California Realty and Loan Co., Inc., had so agreed to place all renewals on fire insurance on said loans with the defendant, Roy Edward Hegg, doing business as the San Diego Insurance Agency. The defendant, Roy Edward Hegg, thereby considered his own welfare and interest in the receipt of commissions on premiums on fire insurance to be renewed by him as one of the primary factors in determining whether or not to enter into said contract with the California Realty [22] and Loan Association, rather than considering only factors which would effect the best interests of the said San Diego Savings and Loan Association, as was his

duty as an officer of said association, in fraud of said association.

A True Bill,

/s/ LAWRENCE L. ROGERS,
Foreman.

/s/ WALTER S. BINNS,
United States Attorney.

[Endorsed]: Filed January 14, 1953. [23]

[Title of District Court and Cause.]

MINUTES OF THE COURT (ARRAIGNMENT)
JAN. 19, 1953

Present: The Honorable Claude McColloch,
District Judge.

Proceedings:

Defendant is arraigned.

It Is Ordered that this cause is continued to Jan. 23, 1953, 11 a.m. for plea.

EDMUND L. SMITH,
Clerk;

By /s/ MARY O. SMITH,
Deputy Clerk. [24]

[Title of District Court and Cause.]

MINUTES OF THE COURT—JAN. 23, 1953

Present: The Honorable Claude McColloch,
District Judge.

Proceedings: Plea.

Defendant pleads Not Guilty to Counts 1, 2,
3, 4, 5, and 6, and Nolo Contendere to Counts
7, 8, and 9.

Dr. Frank E. Toomey called, sworn and
testifies on behalf of defendant.

It Is Ordered case referred to Probation Officer
for investigation and report and continued to Feb-
ruary 23, 1953, 2 p.m. for sentence on Counts 7,
8 and 9, and disposition of Counts 1, 2, 3, 4, 5 and 6.
Court adjourned 11:30 a.m.

EDMUND L. SMITH,
Clerk;

By /s/ MARY O. SMITH,
Deputy Clerk. [25]

[Title of District Court and Cause.]

MINUTES OF THE COURT—FEB. 23, 1953

Present: The Honorable Claude McColloch,
District Judge.

Proceedings:

Hearing on report of Probation Officer and
for sentence on Counts 7, 8 and 9.

Court Sentences defendant to 2½ years imprison-

ment on each of Counts 7, 8 and 9, to begin and run concurrently.

U. S. Attorney declines to move for dismissal of Counts 1, 2, 3, 4, 5 and 6.

It Is Adjudged that the defendant be allowed a stay of execution of said sentence for twelve days, that is March 6, 1953, 5 p.m.

EDMUND L. SMITH,
Clerk;

By /s/ MARY O. SMITH,
Deputy Clerk. [26]

United States District Court for the Southern
District of California, Southern Division

No. 22124—Criminal

UNITED STATES OF AMERICA,

vs.

ROY EDWARD HEGG.

JUDGMENT AND COMMITMENT

On this 23rd day of February, 1953, came the attorney for the government and the defendant appeared in person and by his counsel, William Christensen, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of nolo contendere of the offenses of knowingly and wilfully, combining, conspiring, confederating and agreeing together, and

with each other, to commit offenses against the United States, in that the defendant and the unindicted co-conspirator Alton Bookman Jackson were to participate, share in, and receive, directly and indirectly, monies, property and benefits, through the transactions, loans, commissions, contracts and other acts of the San Diego Federal Savings and Loan Association, with the intent to defraud said savings and loan association through various overt acts, as charged in Count Seven of the Indictment, violation of Sections 371 and 1006, Title 18 U. S. Code; did with intent to defraud the San Diego Federal Savings and Loan Association, a savings and loan association authorized and acting under the laws of the United States, of his honest, faithful, conscientious and disinterested services and functions, participated, shared in, and received, directly and indirectly, money, profit, property and benefits, through various transactions, loans, contracts and other acts of said association, as charged in Counts Eight and Nine of the Indictment, in violation of Section 1006, Title 18, U. S. Code, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a

period of two and one-half (21½) years on each of Counts Seven, Eight and Nine, to begin and run concurrently.

It Is Adjudged that the defendant be allowed a stay of execution of said sentence for twelve days, that is March 6, 1953, 5 p.m.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ CLAUDE McCOLLOCH,
United States District Judge.

A True Copy. Certified this 23rd day of February, 1953.

EDMUND L. SMITH,
Clerk;

By MARY O. SMITH,
Deputy Clerk.

[Endorsed]: Filed February 23, 1953. [27]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The name and address of appellant is: Roy Edward Hegg, 1109 LeRoy Street, San Diego, California.

The name and address of appellant's attorney

is: Wm. Christensen, 444 North Camden Drive, Beverly Hills, California.

The offenses are: 1, violation of Section 371, Title 18, U.S.C.A. and, 2, 2 counts, each charging a violation of Section 1006, Title 18, U.S.C.A.

On February 23, 1953, appellant was sentenced to serve two and one-half years in an institution to be designated by the Attorney General of the United States on each of said three counts, sentences to run concurrently, execution stayed for twelve days from and after February 23, 1953.

Appellant is presently at liberty under said stay of execution.

Appellant above named hereby appeals to the United States [28] Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: February 26, 1953.

/s/ WM. CHRISTENSEN,
Attorney for Appellant.

[Endorsed]: Filed February 26, 1953. [29]

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL

It Is Stipulated and Agreed between the parties hereto, through their respective counsel of record, that the record on appeal herein shall consist of:

1. The indictment on file.
2. Defendant's plea thereto.

3. The Judgment and sentence imposed.
4. Clerk's minutes showing all proceedings had.
5. Defendant's notice of appeal.
6. This Stipulation.

Dated: March 11, 1953.

WALTER S. BINNS,
United States Attorney,

By /s/ NORMAN W. NEUKOM,
Assistant U. S. Attorney.

/s/ WM. CHRISTENSEN,
Attorney for Defendant.

[Endorsed]: Filed March 11, 1953. [30]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 30, inclusive, contain the original Indictment; Judgment and Commitment; Notice of Appeal and Stipulation as to Record on Appeal and a full, true and correct copy of Minutes of the Court for January 19 and 23, 1953, and February 23, 1953, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and

certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 16th day of March, A.D. 1953.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13764. United States Court of Appeals for the Ninth Circuit. Roy Edward Hegg, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed March 17, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

At a Stated Term, to wit: The October Term 1952, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the thirtieth day of March in the year of our Lord one thousand nine hundred and fifty-three.

Present: William Healy, Circuit Judge, Presiding,
Homer T. Bone, Circuit Judge,
Wm. E. Orr, Circuit Judge.

No. 13,764

ROY EDWARD HEGG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER SUBMITTING AND GRANTING
MOTION FOR BAIL

Ordered motion of appellant for admission to bail pending appeal presented by Mr. W. Christensen, counsel for appellant, and by Mr. Morris Sankary, Assistant United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

Upon consideration thereof, Further Ordered said motion granted, and that appellant be admitted to bail pending appeal upon the filing of a bail bond

in the amount of Twenty-five hundred dollars (\$2,500.00), the bail bond, or cash deposited, to be conditioned as required by law, approved by the United States Attorney for the Southern District of California, and the District Judge of said District Court, and filed with the clerk of the said District Court.

United States Court of Appeals
for the Ninth Circuit

No. 13764

ROY EDWARD HEGG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF PARTS OF RECORD
REQUIRED

Appellant intends to rely upon the following points on appeal herein:

I.

That Count Seven of the Indictment does not state facts sufficient to constitute an offense against the United States of America.

II.

That Count Eight of the Indictment does not

state facts sufficient to constitute an offense against the United States of America.

III.

That Count Nine of the Indictment does not state facts sufficient to constitute an offense against the United States of America.

By written stipulation of the parties hereto dated March 11, 1953, and on file herein, the parties designated all that portion of the record material to the consideration of this appeal:

1. The Indictment on file.
2. Defendant's plea thereto.
3. The Judgment and sentence imposed.
4. Clerk's minutes showing all proceedings had.
5. Defendant's notice of appeal.
6. Stipulation of the parties dated March 11, 1953, designating portions of the record on appeal herein.
7. Clerk's certificate.

It is requested that parts of the record hereinabove mentioned be printed.

Dated: April 2, 1953.

/s/ WM. CHRISTENSEN,
Attorney for Appellant.

[Endorsed]: Filed April 5, 1953.

In the
**UNITED STATES
COURT OF APPEALS**
for the Ninth Circuit

BOEING AIRPLANE COMPANY, a corporation,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S BRIEF

J. PAUL COIE

F. THEODORE THOMSEN

Attorneys for Petitioner

1006 Hoge Building
Seattle 4, Washington

HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS,
of Counsel for Petitioner.

In the
UNITED STATES
COURT OF APPEALS
for the Ninth Circuit

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Attorneys for Petitioner

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of Counsel for Petitioner.

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In the
UNITED STATES
COURT OF APPEALS
for the Ninth Circuit

BOEING AIRPLANE COMPANY, a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S BRIEF

I. JURISDICTIONAL STATEMENT

This case is before the Court upon the petition (R. 4449) of Boeing Airplane Company, herein called "Boeing" or "the Company," filed pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136; 29 U.S.C.A., § 151, *et seq.*), herein called the "Act,"¹ to review and set

¹Relevant provisions of the Act are printed in the Appendix, *infra*, pp. A1-A5.

aside an order (R. 285) of the National Labor Relations Board, herein called the "Board," issued against Boeing on March 26, 1953, pursuant to Section 10(c) of the Act.

The proceeding before the Board in which the order complained of was issued began on March 29, 1951, when the Board issued a consolidated complaint against Boeing. On June 18, 1951, this complaint was superseded by an amended consolidated complaint (R. 4), based in part upon nine charges, and three amended charges, filed with the Board, two by Aeronautical Industrial District Lodge No. 751, International Association of Machinists, herein called "Lodge 751," and the others by individuals. The amended consolidated complaint alleged that Boeing had engaged in certain unfair labor practices affecting commerce within the meaning of Sections 8(a)(1), (2), (3) and (4) and Sections 2(6) and (7) of the Act. Boeing filed an answer to this complaint admitting the jurisdictional averments thereof but denying that it had engaged in the unfair labor practices alleged (R. 33). After a hearing, the Board, on March 26, 1953, issued its decision and the order herein complained of (R. 269), dismissing the major portion of the complaint but finding that Boeing had violated Sections 8(a)(1), (2), (3) and (4) of the Act and ordering Boeing to cease and desist from certain acts and to take certain affirmative action, including offering reinstatement

to eight former employees and making them, plus two others, whole for any loss of pay suffered.

On April 13, 1953, Boeing filed in this Court its petition to review and set aside the Board's order (R. 4449). A copy of said petition was forthwith served upon the Board. On May 26, 1953, the transcript of the entire record in the proceeding, certified by the Board, was filed in this Court. On May 25, 1953, the Board filed its answer to the petition and a request for enforcement of its order (R. 4459).

Boeing is aggrieved by the order of the Board, which is a final order, granting in part the relief sought by Lodge 751 against Boeing. The unfair labor practices in question were alleged to have been engaged in within the State of Washington (R. 7), which is within this judicial circuit, and Boeing transacts business within said circuit (R. 5).

This Court has jurisdiction to review and set aside the Board's order under the provisions of Section 10(f) of the Act. This review is governed by said section of the Act and by the Administrative Procedure Act (60 Stat. 237; 5 U.S.C.A. § 1001, *et seq.*).

II. STATEMENT OF THE CASE

This case involves events which occurred following a four and one-half months' strike at Boeing's plants in Seattle and Renton, Washington, in 1948.

Before outlining the Board proceedings, we first summarize the background.

Background

Boeing is a corporation engaged in the manufacture of aircraft at its plants in Seattle and Renton, Washington, and Wichita, Kansas. Only its operations in the State of Washington are directly involved in this case (R. 67). Lodge 751 and Aeronautical Workers, Warehousemen and Helpers Local 451, AFL, herein called "Local 451" or the "Teamsters," are, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act (R. 67).

There is no evidence of anti-union background in Boeing's history. In 1937 Lodge 751 was duly certified by the Board and recognized by Boeing as the exclusive bargaining representative of substantially all of Boeing's production and maintenance employees (Gen. C. Ex. 36, R. 382, 2271). Such recognition and collective bargaining continued without interruption until April 22, 1948 (Gen. C. Ex. 36). During this interval several collective bargaining agreements were executed (R. 2271, 2322, Resp. Ex. 58). Early in 1948 negotiations were in progress looking toward the execution of a new agreement when the parties reached an impasse with respect to wages and a seniority policy (R. 68).

On April 22, 1948, approximately 14,675 Boeing

employees in the unit represented by Lodge 751 went out on strike (R. 2263). Boeing immediately took the position that the strike was called by Lodge 751 in violation of the 60-day notice provision in Section 8(d) of the Act and the no-strike clause in the contract then in effect, and that Lodge 751 had thereby lost its status as collective bargaining representative. Accordingly, Boeing withdrew its recognition of Lodge 751 and discontinued the negotiations then in progress (R. 2339-2340).

Boeing's position was fully sustained by the court in *Boeing Airplane Co. v. National Labor Relations Bd.*, D. C. Cir., 174 F. 2d 988, 991. The court held that Lodge 751 had

“... forfeited all right to be considered as a collective-bargaining agent for employees of the Company.”

The strike, which continued through the summer months of 1948, was marked by numerous acts of violence (R. 2424-2430). During the strike Boeing repeatedly urged the strikers to return to work (Gen. C. Ex. 2, 3 and 4; R. 363) and, prior to the end of the strike, 2,967 of them had returned (R. 2264). Boeing also carried on an extensive local and nationwide campaign to recruit additional employees (R. 350-353). By September 1, 1948, there were 7,879 employees at work in the unit formerly represented by Lodge 751 (Gen. C. Ex. 32, R. 324). The union which was chartered as Local 451, the Team-

sters local, was organized early in the strike by a group of Boeing employees who were dissatisfied with the representation afforded them by Lodge 751 (R. 2924-2931, 2081-2086). During the strike, Local 451 pushed its efforts to organize the new employees and the strikers who had returned (R. 2086-2091).

The strike ended on September 13, 1948, four and one-half months after it had begun (R. 383). Lodge 751 offered unconditionally to return its men to work (R. 69; Gen. C. Ex. 27), and early on the morning of the 13th six or seven thousand strikers gathered at the plant and presented themselves for reemployment (R. 2430). The strikers were reemployed as expeditiously as possible, and of the 8,954 strikers who thereafter applied for reemployment through Lodge 751 all but 64 were reemployed (R. 2266). By October 1, 1948, the number of employees in the unit formerly represented by Lodge 751 had risen to more than 11,000, and by the end of the year it was in excess of 18,000 (Gen. C. Ex. 32).

Shortly after the end of the strike, Lodge 751 began a vigorous organizing campaign within the plant and its organizers and those of Local 451 were accorded equal rights of access to the workers (R. 391, 394-395, 2315, 2327; Gen. C. Ex. 29 and 30). During the following months Lodge 751 and Local 451 vied for the right to represent the production and maintenance unit (R. 2359-2365; Resp. Ex. 59;

R. 2365). Following an election conducted by the Board on November 1, 1949, Lodge 751 was again certified by the Board and recognized by Boeing as the exclusive representative of substantially all of Boeing's production and maintenance employees (R. 69; Resp. Ex. 81, R. 3885). Since then, Lodge 751 and Boeing have entered into collective bargaining agreements (R. 69). Labor relations have been very amicable (Resp. Ex. 83, R. 3949; Resp. Ex. 86, R. 3950).

Board Proceedings

The amended consolidated complaint (R. 4) was very broad in scope. It was based in part on nine charges and three amended charges filed during the period from September 20, 1948, to June 15, 1951. The major portion of the complaint alleged that Boeing had discriminated against 259 individuals following the end of the strike in regard to hire or tenure of employment so as to discourage membership in Lodge 751 in violation of Section 8(a) (3) of the Act. (Par. XXVII, R. 28). Forty of these individuals were allegedly discriminated against because they had filed charges against Boeing, or because their names were listed in such charges, in violation of Section 8(a) (4) of the Act (Par. XXVIII, R. 32). The complaint also alleged that Boeing had, during and after the strike, dominated and supported Local 451, the Teamsters local,

in violation of Section 8(a) (2) of the Act (Par. XXVI, R. 28). Finally, it was alleged that, by certain specific acts (Par. VII, R. 7) and all the other acts alleged, Boeing had interfered with its employees in violation of Section 8(a) (1) of the Act (Par. XXV, R. 28).

The hearing before the Trial Examiner was held in Seattle from June 18, 1951, through September 11, 1951 (R. 54). More than 300 witnesses testified; in excess of 300 exhibits were introduced; and the resulting record consisted of approximately 6,000 pages of testimony and argument.

By the end of the General Counsel's case, he had withdrawn the allegations respecting 6 of the 259 persons allegedly discriminated against and, upon various motions to dismiss made by Boeing, the Trial Examiner had dismissed the allegations respecting all but 99 of the remaining 253. All of the 99 were in Lodge 751's unit, engaged in the strike, were rehired following the strike and thereafter were discharged or laid off (R. 63-66). In the Intermediate Report and Recommended Order, issued on January 3, 1952, consisting of 173 pages (R. 54-226), the Trial Examiner found that Boeing had discriminated against only 3 of the remaining 99, in that it discharged Parezanin because of his participation in the strike (R. 203), discharged Burrell because he refused to remove a Lodge 751 committeeman's badge (R. 207), and changed Haworth's

three-day layoff to a discharge because of his union activities (R. 208), thereby violating Sections 8(a)(3) and (1) of the Act (R. 221). He recommended that these 3 be reinstated with back pay (R. 225).

The Examiner found no violations of Section 8(a)(4) (R. 223-224). He did find that, for a time following the end of the strike, Boeing assisted and supported Local 451, thereby violating Sections 8(a)(2) and (1) of the Act (R. 219-221) and recommended that Boeing be ordered to cease and desist therefrom (R. 224). Finally, he recommended that the complaint be dismissed with respect to all the other unfair labor practices alleged (R. 221).

As to the remedy, the Trial Examiner found that the record did not indicate a general disposition to violate the Act. Accordingly, he concluded that the issuance of a broad cease and desist order would not be recommended (R. 223).

On March 26, 1953, the Board issued its final Decision and Order (R. 269). It adopted the findings, conclusions and recommendations of the Trial Examiner with certain additions, modifications and exceptions (R. 270). With regard to the alleged discrimination against individual employees, the Board adopted the Examiner's findings as to the 3 persons who had been discharged and, in addition, it found that Boeing had discriminated against 6 other individuals. It had suspended Cinotto for 3

days for violating a Company rule prohibiting the wearing of "I am loyal to 751" streamers in the plant (R. 272), discharged Gerber because of his activities against Local 451 (R. 273-277), laid off Haddix (R. 277-278) and Myrick (R. 278-279) because of their membership in and activities on behalf of Lodge 751, laid off McDonald (R. 279) because of his opposition to Local 451 and preference for the International Brotherhood of Electrical Workers, and demoted Schott because of her membership in Lodge 751, all in violation of Sections 8(a)(3) and (1) of the Act (R. 279-280).

The Board also found, contrary to the Examiner, that there had been one violation of Section 8(a)(4), namely, that Boeing had refused to rehire Nielsen because she had filed a charge against the Company (R. 280).

The Board affirmed the Examiner's findings with respect to Boeing's activities in support of Local 451. Finally, contrary to the Examiner, the Board found four independent violations of Section 8(a)(1), namely, the adoption and enforcement by Boeing of three rules (a rule prohibiting employees from wearing steward and committeeman buttons, a rule prohibiting employees from wearing "I am loyal to 751" streamers, and a rule applied by some supervisors which prohibited union activity on non-working time) (R. 270-272) and the remarks of an assistant foreman directed to two employees evi-

dencing bias in favor of Local 451. These remarks were considered not to have been isolated and insignificant (R. 273).

Contrary to the Examiner's recommendation, the Board also issued a broad cease and desist order (R. 286). Finally, Boeing was ordered to take the affirmative action usual in cases of this kind (P. 286-287).

The foregoing is the background of the case and a general recital of the facts. In order to facilitate decision of the case, the detailed facts pertinent to each issue involved are related in the appropriate section of our argument, Section V, infra.

Questions Involved

1. Whether, in view of the unusual conditions existing at the end of the strike, Boeing had the right to suspend one employee and discharge another for violating Company rules adopted to prevent violence and maintain production.

2. Whether the testimony that some minor supervisors mistakenly thought a policy existed prohibiting union activity on Company premises during working hours without evidence of any enforcement thereof, and whether the isolated remarks of an assistant foreman evidencing bias toward one union constitute independent violations of the Act.

3. Whether the evidence supports the finding that

Boeing unlawfully discharged three employees, laid off three others and demoted another or whether such actions were for cause.

4. Whether the evidence justifies the finding that one employee was not rehired because she filed an unfair labor practice charge.

5. Whether, for a time following the strike, Boeing assisted and supported Local 451, the Teamster's local.

6. Whether certain allegations of the complaint are barred by the statute of limitations prescribed by the Act.

7. Whether the activities of Boeing, as shown by the record, warrant the issuance of a broad cease and desist order.

III. SPECIFICATION OF ERRORS

The Board erred:

1. In holding that the rules: (a) prohibiting employees from wearing "I am loyal to 751" streamers and (b) prohibiting employees from wearing steward and committeeman buttons, adopted and enforced by Boeing, were unlawful (R. 270).

2. In holding that the suspension of Cinotto for refusing to obey rule (a) above was unlawful (R. 272).

3. In holding that the discharge of Burrell for refusing to obey rule (b) above was unlawful (R. 272).

4. In holding that a rule prohibiting union activity on Boeing's premises on non-working time was adopted and enforced and that such rule was unlawful (R. 270).

5. In holding that assistant foreman Smith's remarks of preference for one union were not isolated and that Boeing thereby violated the Act (R. 273).

6. In holding that the three discharges, three layoffs and one demotion were discriminatory and unlawful because such holding is contrary to the preponderance of the testimony and not supported by substantial evidence on the record considered as a whole (R. 273).

7. In refusing to give proper weight to and accept the Examiner's credibility findings with respect to Morrell's testimony and in crediting Gerber in connection with his discharge (R. 273).

8. In relying upon the hearsay evidence adduced by Carrig to substantiate its finding of unlawful assistance and support of Teamsters Local 451 and to support its holding that the discharge of Gerber was unlawful (R. 270, 276).

9. In reversing the Examiner's findings and failing to adopt his recommended order with respect to the demotion of Schott, as to which findings counsel for the General Counsel took no exception, because such reversal is not based on a valid interpretation of Section 10(c) of the Act (R. 279-280).

10. In holding that Boeing refused to rehire Niel-

sen because she had filed a charge with the Board (R. 280).

11. In holding that Boeing for a time unlawfully assisted and supported Teamster Local 451 (R. 270).

12. In denying Boeing's motion, based upon the six-months' statute of limitations prescribed in Section 10(b) of the Act, to dismiss the complaint pertaining to the demotion of Schott and the layoffs of Haddix, Myrick and McDonald (R. 270).

13. In holding that Boeing's activities which the Board found unlawful indicate a purpose to defeat self-organization of its employees, that such activities are potentially related to other unfair labor practices, that the danger of the commission in the future of such other unfair labor practices is to be anticipated, and that a broad cease and desist order is required (R. 283); and in issuing such order (R. 286).

14. In issuing an Order requiring Boeing to cease and desist from discouraging membership in, or in any other manner interfering with, restraining or coercing its employees in the exercise of the right to join or assist, the International Brotherhood of Electrical Workers, because the issuance of such an Order is not based upon any charges ever served upon Boeing, is beyond the scope of the complaint or any amendment thereof, is erroneous and is not

based upon a valid interpretation of Section 10(b) of the Act (R. 285-286).

15. In issuing the Order here involved because the material findings of fact upon which it is based are erroneous and not supported by substantial evidence on the record considered as a whole; the conclusions of law upon which it is based are not supported by the findings of fact and are contrary to law; and the Order is arbitrary and capricious, constitutes an abuse of discretion by the Board and exceeds the powers vested in the Board (R. 285-287).

IV. SUMMARY OF THE ARGUMENT

This case involves events in the year following a four and one-half months illegal strike ending September 13, 1948. Because of the volatile situation existing upon return of the strikers and the presence of two rival unions competing for recognition, the Company prohibited the wearing within the plant of ribbon streamers bearing the words "I am loyal to 175" and large committeeman badges. It is urged that these rules were manifestly proper and that the discipline by suspension of one employee for three days and discharge of another for disobedience of these rules, was within management's prerogatives.

In addition, the Company more rigidly enforced a policy of long standing forbidding union activities

on working time. Some few minor supervisors mistakenly understood the instructions to mean a prohibition on Company premises. However, there is no evidence of enforcement or any discipline imposed as the result of such error. This and a random remark or two by one minor supervisor about a year after the strike are so isolated and inconsequential that an unfair labor practice predicated thereon amounts to an abuse of discretion.

The remaining eight individual cases, out of the 259 originally in the complaint, upon which the Board ruled involve three discharges, three layoffs, one demotion and one instance of alleged failure to rehire on account of having filed an unfair labor practice charge. In each of these cases the Company was motivated by just and proper cause.

Where credibility is an issue, we are accepting the Examiner's findings without challenge and contest only the inferences drawn from the evidence or the sufficiency thereof to support the findings. In one instance the Board has reversed the Examiner's credibility findings, and on this we argue that the Board is patently wrong.

We contend the evidence does not establish that for a time following the strike Boeing assisted and supported the Teamsters local.

We also urge that certain allegations of the complaint are barred by the six months' limitation prescribed by the Act.

Finally, the record does not warrant the issuance of an omnibus cease and desist order.

In essence, the insufficiency of the evidence to prove the allegations of the complaint and to sustain the Board's decision is the premise of our attack upon the Board's order. This requires an examination into the detailed facts relating to each individual, and this is done at length hereinafter in the brief.

V. ARGUMENT

1. THE RULES, CINOTTO AND BURRELL

In view of the unusual conditions existing at the end of the strike, Boeing, in order to prevent violence and maintain production, had the right to adopt and enforce rules regulating employee conduct and to suspend Cinotto and discharge Burrell for violating them.

The Unusual Conditions

Mr. Gibson, who has been president of Lodge 751 since 1943 (R. 380-381), testified that on two or three occasions during the strike Lodge 751 was fined for violating a court order restraining its picketing activities (R. 398). The court's findings of fact in one of these contempt proceedings (Resp. Ex. 68; R. 2428), based on admissions made in open court, show that Mr. Gibson, in addressing several thousand members of Lodge 751 at a meeting held during the strike, reflecting the temper of Lodge 751, said substantially the following:

"The Taft-Hartley Act prevents them from being fired. But it doesn't prevent us from taking action of our own. Down there at Boeing's, as you know, there are high scaffoldings, ladders and high jigs with scaffolding around them. Heavy bucking bars, drill motors, rivet guns and other heavy things that can be kicked off the deck or slip out of your hands and educate a scab. They can make a tight turn on the scaffolding and trip and fall * * * We promise to make it unhealthy for them. There are plenty of ways we can make it desirable for them to get off their jobs in a hurry." (Resp. Ex. 68, p. 5, R. 2428)

Mr. Dierst, the head of Boeing's Plant Protection Department (R. 2424), testified regarding the incidents of violence during the strike. Several employees who had returned to work across the picket lines were beaten (R. 2424-2425); threatening calls were made to the homes of some employees (R. 2429); three homes were bombed (R. 2425), and two were painted and smeared with the word "scab" (R. 2428); rocks were thrown through windows (R. 2429); and several automobiles were damaged (R. 2429). In addition, a Boeing employee was murdered in a parking lot two days before the strike ended, and while it was never determined who killed him, the fact that he was a Boeing employee working behind the picket lines was publicized in the local papers (R. 2429).

When the strike was called off, Lodge 751 instructed all its members to report for work for the first shift on Monday, September 13, 1948 (R. 390).

The result was that at 7:30 A. M., on the 13th, the employees who had returned to work across the picket lines during the strike, nine or ten thousand in number (R. 2435), were met at the plant gates by the mass of returning strikers seeking reemployment (R. 2430). Mr. Dierst described the situation which existed on Sixteenth Avenue South, near the main gate of the main plant, as follows:

"A. When the strike was called off, the Union had publicized it, advising that the striking employees should come to the plant; and they started to drive in there somewhere between 5:30 and 6:30 in the morning, and by 7:30, when the employees were coming to work, it was estimated that there was between six and seven thousand on Sixteenth Avenue South, and we were able with the assistance of the police to get a line for the employees to get through.
* * * the whole scene was just about ripe for a good riot if something sparked it off.
* * *

"A. The police were very apprehensive; they had a large number of uniformed policemen there, and they had a lot of plain clothes men scattered throughout the area.

Q. How many uniformed officers were there?

A. I would make a rough guess that they had in the neighborhood of 100 police there, and they also had some reserves stationed at the Georgetown Police Station ready to move in in the event that things got out of control." (R. 2430-2431)

He testified that the same situation continued for the next two or three days, although the number assembled decreased somewhat (R. 2434-2435).

This situation was also pictured and described

with less restraint in the *Aero Mechanic*, the official publication of Lodge 751 (R. 2135), dated September 16, 1948 (Resp. Ex. 69, p. 4, col. 1; R. 2434) reproduced in part herein (Appendix pp. A5-A6.

Mr. Dierst described the situation inside the plant as follows:

"A. The situation was rather tense to start with. * * * The first few days the returning strikers were fed in rather rapidly, and we were mixing up the two groups where the feeling was running pretty high; * * *

A. Well, in some instances supervision advised us as to tense situations which they felt they had in their department, and in many instances there was the word 'scab' written on other people's tool boxes, and in the toilet, and various inflammatory remarks of that nature."

* * *

(R. 2435-2436)

During the strike Local 451 had been actively recruiting members among the Boeing employees and as a result claimed to have approximately 5,000 members (R. 2089). Mr. Logan, Vice President, Industrial Relations, Boeing, whose division included Boeing's office of labor relations, plant protection department and personnel department during the period in question (R. 339), characterized the problem of divided loyalty among the employees by saying:

"We had in our plant at the time a substantial number, numbering in the thousands, of members of [the] two unions plus another substantial number, in the thousands, of people

who had not seen fit to affiliate with any union." (R. 2308)

Respondent's Exhibit 38 indicates that one month after the termination of the strike the two rival unions each had approximately 5,000 members, while 4,000 employees were unaffiliated.

The Rules; Cinotto and Burrell

At the end of the strike, the strikers returned to work wearing printed streamers about four inches long bearing the words "I am loyal to 751" (R. 360-361, 2063; Resp. Ex. 69, R. 2434). Mr. Logan testified that because Boeing thought the streamers incendiary and inflammatory in nature, it refused to permit them to be worn inside the plant gates (R. 360).

Doris Cinotto, a striker, returned to work on the day the strike ended (R. 2058-2059). On that day her supervisor observed that she was wearing one of the 751 streamers (R. 2063). He asked her to remove it, which she did, and further asked her not to wear it again. However, two days later she was again observed wearing a streamer inside the plant; and upon being asked to remove it, she did. Thereafter, her supervisor, after talking to her about wearing the streamer, after he had warned her, suspended her for three days because, as she put it, "That was about the only way that they could teach me." (R. 2064)

Prior to the strike, Lodge 751's shop committeemen wore a special badge, about an inch and a half in diameter (R. 2056), identifying themselves as shop committeemen (R. 360). Mr. Logan testified that during and after the strike Boeing did not permit these badges to be worn by anyone in the plant (R. 360).

Immediately prior to the strike, Stanley Burrell was employed by Boeing and held the office of shop committeeman in Lodge 751 (R. 2053). He went out on strike and remained out until the end. When the strike was over, Boeing sent him a telegram asking him to return to work. At that time he was still a shop committeeman as far as Lodge 751 was concerned, and he was instructed by the union to wear a shop committeeman's badge upon returning to work, which he did. After being advised by his foreman that he could not wear the badge because the foreman did not "recognize" it, he was twice asked to remove it and he twice refused. Thereupon he was suspended for refusing to remove the badge. Thereafter he did not apply for employment at Boeing, nor did Boeing ever call him back (R. 2053-2057).

The Rules, Suspension and Discharge Were Lawful

The Trial Examiner found that Boeing did not violate the Act by forbidding the wearing of the 751 streamers (R. 220). Considering the temper of the employees at the time the streamers appeared,

he was persuaded that Boeing's belief that these slogans were provocative and would tend to lead to disorder was a reasonable one. Consequently, he found no violation of the Act in the suspension of Cinotto (R. 220). The Board took a contrary position and held that both the rule and the suspension of Cinotto violated the Act (R. 270-272). The Trial Examiner found (R. 206-207) and the Board agreed (R. 272) that Burrell's discharge violated the Act. In addition, the Board, contrary to the Examiner, held that the rule prohibiting the wearing of shop committeemen badges constituted an independent violation of the Act (R. 270-272).

The Board holds that such rules are presumptively invalid, in the absence of special circumstances which make them necessary in order to maintain production and discipline. Its decision on this issue rests upon the case of *Republic Aviation Corp. v. National Labor Relations Bd.*, 324 U. S. 793. In that case the Supreme Court affirmed the ruling of the Board and, in doing so, quoted with approval the Board's view that the wearing of steward buttons did not carry any implication of recognition where there was no competing union in the plant. The language of the Board's decision quoted was, in part, as follows:

“ ‘We do not believe that the wearing of a steward button is a representation that the employer either approves or recognizes the union in question as the representative of the employ-

ees, *especially when, as here, there is no competing labor organization in the plant.* Furthermore, there is no evidence * * * that the appearance of union stewards in the plant *affected the normal operation of the respondent's grievance procedure'.*" (Emphasis added) (324 U. S. at 802, footnote 7).

In affirming the Board's decision, the Supreme Court said: "No evidence was offered that any unusual conditions existed in labor relations * * *" (324 U. S. at 801).

The Board decision in the instant case completely ignores the recognized exceptions noted in both the Board and the Supreme Court decisions, namely, "no competing labor organization in the plant" and no "unusual conditions". The Board inferentially recognizes that working time is for work and acknowledges the right of management to maintain production and discipline. When the two rules in question are examined in the light of the conditions existing at the end of the strike, it is apparent that they were solely designed to prevent violence, maintain production and preserve the necessary degree of neutrality required by law to permit employees a free choice in selecting their bargaining agent.

In this case there were three factors creating "unusual conditions", recognized by the Supreme Court as allowing more stringent regulations than might otherwise be permitted. The strike was long and bitter. Mr. Gibson expressed the view of returning strikers in terms of threats to the life and safety

of those who worked during the strike. Mr. Dierst described the charged atmosphere existing in and about the plant upon the return of the strikers. The record abundantly demonstrates that two strong unions were competing within the plant for representation rights.

The streamers "I am loyal to 751" were plainly inflammatory and irritating, and did not serve any legitimate union objective. On the contrary, they were obviously designed to taunt the workers then in the plant, thus providing a trigger calculated to set off violence and disrupt production.

The shop committeemen badges were also plainly inflammatory. Permitting them to be worn under these circumstances would have indicated an unlawful Company favoritism toward one of the two rival unions. The committeemen badges indicated recognition of an official status, especially in the matter of processing grievances, which in fact did not exist. An entirely different grievance procedure, not involving shop committeemen, was then in operation. For Boeing to have permitted shop committeemen badges would have carried the erroneous implication of recognition of Lodge 751. It is submitted that precedent supports the validity of such a rule under the unusual circumstances here in order to ward off violence between hostile rival unions.

Neither of the rules should be considered an in-

dependent violation of Section 8(a) (1) of the Act and the disobedience thereof furnished valid reasons for the suspension of Cinotto and the discharge of Burrell.

2. THE MISTAKEN RULE AND SMITH'S REMARKS

The testimony that some minor supervisors mistakenly thought a policy existed prohibiting union activity on Company premises during nonworking time without evidence of any enforcement thereof and the isolated remarks of an assistant foreman evidencing bias toward one union do not constitute independent violations of Section 8(a)(1) of the Act.

The Mistaken Rule and Smith's Remarks

Mr. Logan testified that immediately following the end of the strike Boeing believed it necessary to emphasize and more rigidly enforce the long-standing Company policy prohibiting union activities on Company time (R. 2306). Mr. Logan summarized the situation as follows:

“ . . . tension was high and tempers were short, and we felt that it was more than ever necessary to enforce with more rigidity this rule to prevent the generation of more heat than light, which in turn might cause violence in the plant, and disruption, and more than ever lost time in production.” (R. 2306)

He further stated that “Company time,” within the meaning of this rule, was considered to be all the time on shift except the two recess periods and the lunch period (R. 359-360). This rule was handed down verbally to supervision (R. 359).

In the entire record we have found only five employees who testified (R. 644, 906, 921, 932, 1632) that they were told not to engage in or discuss union affairs on Company premises. With over 1,000 supervisors (R. 2278), approximately 100 of whom testified during the course of the hearing, we have found only three, two assistant foremen and one foreman (R. 3161, 3184, 3196), who stated that they informed those under them that the Company policy was to forbid union activity on Company premises. However, there is no evidence that the rule, as mistakenly extended to Company premises, was enforced or that any disciplinary action was taken against any individual.

Caroline Scott and Dora Crozier testified that in the forepart of August 1949 their assistant foreman, Smith, indicated that members of Teamster Local 451 would have a better chance than some of the others of escaping the impending layoff (R. 2136-2139).

Insignificant and Isolated

The Trial Examiner, after noting the evidence that some supervisors extended the prohibition against union activities to Boeing's premises (R. 189), found that this did not violate the Act (R. 220). Although he credited Scott and Crozier respecting Smith's remarks, he found these did not violate the Act in view of their isolated character

and utterance by a minor supervisor (R. 220-221).

The Board, contrary to the Examiner, held that both the erroneous extension of the rule by some supervisors and Smith's remarks constitute independent violations of Section 8(a)(1) of the Act (R. 270, 273).

In *Ohio Associated Telephone Co. v. National Labor Relations Bd.*, 6 Cir., 192 F. 2d 664, 668, the court reversed the Board's decision, where the Board found a violation of the Act based on testimony that a traffic superintendent and a minor supervisor, following abandonment of the strike, said, "There would be no mention of union affairs on company premises." The court said that there was no evidence that any formal rule was promulgated or that any effort was made to enforce the informal warning. The examiner had considered the observations isolated and unrelated to any other issues considered at the hearing. There was evidence that the company had repudiated the supervisor's observations. The court went on to say that the Board was apparently affected by having found an unlawful discharge, which the court was reversing.

Here we have precisely the same factual circumstances. While there is no showing that Boeing repudiated the alleged error, there is no evidence that such error was ever brought to the attention of the higher echelons of management in order to permit repudiation. More importantly there is no evidence

that the rule in question was ever enforced. For these reasons the Board's reversal of the Examiner's conclusion should be rejected.

As regards Smith's remarks, if remarks made to two people about a year after the end of the strike by a lone foreman out of over 1,000 supervisors are not isolated and insignificant, we know of no way to describe or define "isolated". Inasmuch as General Counsel in two years' search was able to produce at the time of the hearing only two persons to testify that such remarks were made to them, we submit that the Examiner's finding that the remarks were isolated and were not worthy of a finding of a violation of Section 8(a)(1) of the Act is fully substantiated.

3. THE DISCHARGES, LAYOFFS AND DEMOTION

Haworth, Parezanin and Gerber were discharged, Haddix, Myrick and McDonald were laid off, and Schott was demoted for just and proper cause and the Boards' findings to the contrary are not supported by substantial evidence on the record considered as a whole.

When the charge is made that an employer has unlawfully discharged an employee in the exercise of the prerogatives of management, three things must be shown by substantial evidence to support the charge. It must be shown that the employer knew that the employee was engaging in a protected activity, that he was discharged by reason of

such activity, and finally that the discharge had the effect of encouraging or discouraging membership in a labor organization. The burden rests upon the General Counsel to prove these requisites by the preponderance of the competent and credible evidence. Until there is a reasonable basis in the evidence to support the first and second requisite, an employer need not excuse or justify his action. Even when the evidence does raise a reasonable inference of discrimination, that inference may be rendered unreasonable by the employer's excuse or justification. The burden of going forward then shifts to the General Counsel and requires additional evidence to establish the alleged discrimination. In order to supply a basis for inferring discrimination, it is necessary to show that the employee's engaging in a protected activity was the substantial or motivating reason for his discharge, despite the fact that other reasons may exist. These principles have been enunciated in many cases, e.g., *National Labor Relations Bd. v. Whittin Machine Works*, 1 Cir., 204 F. 2d 883, and cases cited therein. If the real motivation is disobedience, insubordination or disloyalty, the discharge is for cause. In *National Labor Relations Bd. v. Local Union No. 1229, IBEW*,, U.S., 22 L.W. 4031, 4034, decided December 7, 1953, the Court said:

“Many cases reaching their final disposition in the Courts of Appeals furnish examples em-

phasizing the importance of enforcing industrial plant discipline and of maintaining loyalty as well as the right of concerted activities. The courts have refused to reinstate employees discharged for 'cause' consisting of insubordination, disobedience or disloyalty."

Some of the instances of alleged discrimination involve a direct conflict between the testimony of an employee and the testimony of a supervisor, the employee testifying that some remark evidencing anti-union bias was made to him by a supervisor and the supervisor flatly denying that the remark was made. Recognizing that questions of credibility are generally for the Trial Examiner who has an opportunity to observe the demeanor of the witnesses (*National Labor Relations Bd. v. Swinerton*, 9 Cir., 202 F. 2d 511, 514), we do not challenge his findings as to the credibility of witnesses. Thus, in challenging the Board's findings where it accepted the Examiner's findings as to credibility, we differ from it solely as to the weight to be given the credited evidence and the inferences which may reasonably be drawn therefrom, assuming for the purpose of argument that the witnesses credited by the Examiner spoke the truth. However, where the Board refused to accept the Examiner's credibility findings, we take the position that the Board erred in this regard, as well as in assigning weight to the evidence and drawing inferences therefrom in reaching its ultimate conclusions.

The Discharges

Evidence on Haworth's Discharge

Jack E. Haworth, a punch press operator, returned to work after the strike in September 1948, and on January 27, 1949 was terminated for insubordination and misconduct (R. 1170-1171).

His assistant foreman, Pickett, testified that after having been given a work assignment Haworth took the work out of the press and, upon being challenged, said he had pulled the job "for my [Pickett's] benefit and I would have known it if I wasn't so God-damned thick-headed" (R. 3293). This testimony was based upon Pickett's written memo made the day of the incident. This was the second incident of this type (R. 3174-3175). Haworth's foreman, Megorden, testified that he made an investigation and determined that Haworth pulled the job out of the press and put in a much easier job to run, thus selecting his own job instead of taking his supervisor's orders (R. 3172). That an argument of some type occurred is confirmed by Haworth, who requested a pass-out slip "because of the nervousness caused by the argument" (R. 1182). Pickett testified that upon another occasion Haworth refused to work on a particular machine as requested, which machine was within the scope of his job assignment (R. 3295).

Another foreman, Pavlick, related a conversation with Haworth wherein Haworth expressed dissatis-

faction with his job and the amount of money he was receiving, and Pavlick said this attitude resulted in his not giving a full day's work (R. 3259-3260).

“Q. In other words, he was disloyal to the Company?

A. Well, I should say he was, yes. He wasn't giving a day's work for what he was getting out of it.” (R. 3260)

Pickett also testified as to the insufficient quantity of Haworth's work (R. 3295). The Examiner believed Pickett's testimony as to Haworth's hostile attitude and apparent flouting of Pickett's authority, but he concluded that discharge was too severe a penalty and that Megorden, Pickett's superior, may have been influenced by Haworth's close connection with union activities in the plant (R. 207-208).

Haworth Was Discharged Because of Misconduct and Insubordination

The only evidence in the record which supports the Board's finding that Boeing discharged Haworth because of his participation in union activities is the testimony of Megorden that Haworth “was at that time very closely connected with the union activities going on at the plant there” (R. 3173), and that “Pickett had come to me previously and stated that Haworth was active in union work, and he was quite a booster, and he was a quick-tempered individual, which bore itself out later

when he refused to do what he was told to do" (R. 3183).

Mere reference to union activities does not establish that they were protected union activities. The burden is on the General Counsel to establish this fact. Many of the cases in this proceeding involved, as the Board found, improper union activities during working hours. Further, this reference to "union activities" should not be taken out of context where the evidence establishes other and more important considerations which prompted Megorden to take the action he did. In view of the substantial credited evidence concerning Haworth's insubordination, management and not the Board has the right to determine the penalty. Discharge for this reason is for "cause."

Evidence on Parezanin's Discharge

Don J. Parezanin was hired in May 1947, served as a Lodge 751 shop committeeman for two or three months during the fall of that year, stayed out for the period of the strike, during which he was not particularly active, and came back to work October 14, 1948 (R. 713-715). On November 2, 1948, he was suspended for twice leaving his shop without permission during an overtime work period (R. 716, 719, 722, 3272). This violated a strictly and uniformly enforced published Company rule (R. 3273-3274). Twice before he had been suspended for vio-

lating Company rules, once in the fall of 1947 for being absent from his work station without authorization (R. 729-730, 3279), and once in March 1948, for smoking in a nonsmoking area (R. 730). On November 8th he was given a hearing on his suspension before a board of supervisors presided over by Molitor, superintendent, sub-assembly (R. 719, 3285). Shortly thereafter he was discharged (R. 724, 732).

Parezanin testified that he had permission to leave his shop on both occasions (R. 726-727, 731) and that he so advised the supervisors at his hearing (R. 722). Molitor testified that at the hearing Parezanin admitted that he did not have permission on either occasion (R. 3286). Parezanin also testified that at his hearing he believed it was Molitor who asked him if he were loyal to Boeing and if he was why he did not go to work during the strike. Parezanin replied that he did not want to go through the picket line. According to Parezanin, Molitor retorted that it was an unlawful strike and that as soon as Parezanin learned that, he should have returned to work. Molitor then went on to ask what assurance Parezanin could give that he would be loyal to the Company should he be reinstated. When Parezanin responded, "My word", Molitor said that it appeared by reason of his prior grievance that his word wasn't any good (R. 720-722).

Molitor testified that absolutely no such line of

questioning or conversation occurred (R. 3285-3286). He further testified that Parezanin was discharged because he admitted that twice he knowingly and deliberately walked off the job without permission in violation of a Company rule, belligerently claiming that this was no reason to fire him (R. 3286-3287).

Parezanin Was Discharged for Violating a Company Rule

The Trial Examiner failed to credit Parezanin's assertions that he had permission to leave his shop (R. 203). Accordingly, he found that Parezanin was suspended for a non-discriminatory reason, namely, for leaving his shop without permission (R. 203). However, apparently crediting Parezanin's version of what occurred at his hearing, the Examiner found that Molitor's questioning established that Parezanin would have been reinstated at that time were it not for the fact that he had failed to work during the strike (R. 203). Thus, he concluded that Boeing discriminated against him because of his participation in the strike (R. 203). The Board adopted the Examiner's findings and conclusions respecting Parezanin without comment or modification (R. 270, 280).

The only evidence in the record which remotely supports the Board's finding is Parezanin's testimony as to what Molitor said at the hearing,

which apparently was credited by the Examiner. Although we believe it clear from the record that this credibility finding by the Examiner was erroneous, we shall assume for the purpose of argument that Molitor questioned Parezanin substantially as related by the latter.

Considering the case on this basis, it is our contention that the evidence does not support the inference drawn by the Board, from Molitor's questioning, that Parezanin was discharged because he failed to work during the strike. It seems highly improbable that Boeing, well knowing that Parezanin was a striker, rehired him following the strike and then, less than a month later, singled him out of the thousands of returned strikers and discharged him *because he was a striker*. Although he had been a shop committeeman for a short period during 1947, he was not prominent in union or strike activities.

On the other hand, mindful of the Examiner's conclusion that no general policy of discrimination against strikers existed (R. 214) and in view of the fact that Parezanin had twice before been suspended for violating Company rules, it seems plausible to conclude that Parezanin was discharged because of his third flagrant violation thereof on two occasions. We submit that Parezanin's participation in the strike had nothing whatever to do with his discharge.

Evidence on Gerber's Discharge

Arthur C. Gerber, a timekeeper, returned after the strike and was terminated December 7, 1948, for making threats to fellow employees concerning their job status. Morrell, chief timekeeper, upon receiving a report from another supervisor that Gerber was threatening fellow employees that they would be out of a job in thirty days if they did not join Lodge 751, investigated the matter and Gerber was terminated.

Trial Examiner's Crediting of Morrell Should Be Sustained

This particular case calls for the application of the well-established rule that the findings of an experienced and impartial trial examiner on veracity must not be overruled unless a very substantial preponderance of the evidence is against such conclusion.

The Board set aside the Examiner's credibility findings with respect to Morrell (R. 273), and instead credited the discharged employee (R. 274). Accordingly, it found, contrary to the Examiner, that Gerber's discharge was unlawful (R. 277). In overturning the Examiner's crediting of Morrell, the Board holds that the Examiner did not fully consider the entire record, which the Board concludes demonstrates Morrell's unreliability (R. 274).

First, the decision indicts Morrell for having said that he arranged for Gerber's discharge "after he had secured written statements from three or four employees who had complained that they had been threatened by Gerber" (R. 274). This is not a fair analysis of Morrell's testimony considered in its entirety.

Morrell testified that after being notified of the situation by Gerber's supervisor he interviewed "—six or seven, possibly eight—" (R. 2713), and that they each confirmed they had received threats from Gerber that if they did not join 751 they would not have a job within thirty days and that these threats were made during working time. Morrell asked each if they would give a written statement, and "Some said they would and some said they would not." (R. 2714). Upon being asked whether written statements were subsequently obtained, he replied, "They were, yes." This is not the equivalent of saying that he [Morrell] had obtained the written statements.

The next two questions are the only possible basis for the Board's finding:

"Q. And they confirmed their oral statements to you? A. Yes, that is true.

Q. And on the basis of that, did you participate in recommending his dismissal?

A. I did, yes." (R. 2714)

The foregoing does not justify the Board's conclusion that Morrell falsely testified that he secured

written statements and thereafter arranged for Gerber's discharge.

This testimony also conveys the meaning that, because of threats to fellow employees which Morrell confirmed by personal interviews, he then arranged for and executed Gerber's termination. Significantly, as his testimony continued, he testified that upon handing Gerber his termination notice, he told Gerber why he was being terminated and that he had confirmed it by interviewing the witnesses (R. 2714).

Next, Morrell is charged with testifying that he was present when the Factory Review Board considered Gerber's case, although Gerber said he was not. The Board found that, "the Respondent's records support Gerber's testimony in this respect" (R. 274). The Company record supposed to thus support Gerber is set out in full in the record (R. 2723-2724).

Morrell was questioned as follows:

"Q. Following that, did you participate in any review of the action taken?

A. Yes, I did.

Q. And was Mr. Gerber ever present at any of these reviews then?

A. I believe he was.

Q. That you recall?

A. I believe he was. I can't say for sure." (R. 2714-2715)

The Company record shows that on December 13, 1948, Gerber was interviewed by a committee and notes that "Mr. Gerber was then told that he would

be notified on the Company's action by the end of the week. Morrell was then called in, and he stated that he had talked to several employees who said that they had been approached. * * * " (R. 2724). If anything, the record confirms Mr. Morrell's testimony that he did participate with the Review Committee and only by severe straining can it be said that he ever testified that Mr. Gerber was present at the same time, and, even if that is the fair import of his testimony, he makes a far from positive assertion when he says, "I believe he was. I can't say for sure."

Thus, on the basis of the questions and answers above noted, the Board concludes that they were privileged to disregard the Trial Examiner's credibility findings. This is contrary to the decisions involving this subject. In *National Labor Relations Bd. v. Universal Camera Co.*, 340 U.S. 474, 496, the court said:

"We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion."

In *National Labor Relations Bd. v. Universal Camera Co.*, 2 Cir., 190 F. 2d 429, 430, which is the same case upon remand, Judge Hand observed:

"Perhaps as good a way as any to state the change effected by the amendment is to say

that we are not to be reluctant to insist that an examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded."

National Labor Relations Bd. v. Supreme Bedding & Furniture Mfg. Co., 5 Cir., 196 F. 2d 997; *National Labor Relations Bd. v. West Coast Casket Co.*, 9 Cir., 205 F. 2d 902.

There is not the requisite substantial preponderance required to reject the Trial Examiner's credibility findings, but on the contrary there is substantial evidence in support thereof.

The Examiner said:

"I credit the testimony of Lynn Morrell that he reasonably believed Gerber to be guilty of making threats to those who would not join Lodge 751. This conclusion is supported by other evidence * *" (R. 204)

This finding should be adopted and Gerber's case dismissed.

The Layoffs and Demotion

Background

Following the conclusion of the strike, three events occurred necessitating a reduction in the work force. In April 1949, layoffs occurred as a result of the cancellation by the United States Air Force of the B-54 production contract (R. 316). In August 1949, there was a rescheduling of the B-50 production, owing to trouble with Government-furnished equipment (R. 325). This resulted in layoffs in August, September, October and November

(Resp. Ex. 38; R. 2258). At about the same time the Stratocruisers were completed (R. 329). These events affected almost every shop, although some more drastically than others. Requirements as to work force would fluctuate from time to time in the several shops depending upon the stage of completion in relation to the production line (R. 320).

Mr. Heiland explained in detail the Company procedure concerning layoffs (R. 2382-2394). The determination that a given shop had a surplus might originate from the decision of the assistant foreman within the shop or from the top, by direction of the office of the Vice President of Manufacturing. Thereafter, the general foreman was free to utilize surplus employees elsewhere in his shop, provided the new assignment did not involve either a promotion or demotion. If the surplus employees could not thus be used, the names were then sent to Mr. Heiland's office to determine whether or not there could be a lateral transfer elsewhere throughout the Company's operation.

Furthermore, Mr. Heiland testified that during the war when the Company was building a single model airplane on a mass production basis, an employee doing this type of production might be qualified to do a simple repetitive assignment, whereas following the war practically all work involved custom airplanes and an employee had to be able to do eight or nine or a dozen assignments (R. 2382).

While Mr. Heiland's office relied quite a bit on the judgment of individual supervisors of all grades who would submit lists of surplus employees to him, he specifically testified, "I always have a hand in the surplusing of employees" (R. 317), and in response to the question, "The instructions with respect to layoffs, do they in all cases come from your office then?", he replied, "That is correct." (R. 2385).

Heiland's office did not normally have any knowledge of nor did they inquire of Accounting (the only source of information) concerning any individual's union affiliation (R. 2385).

After the strike, efforts were made to install a satisfactory performance rating or grading to evaluate each employee. By August of 1949, the Company had what it considered an accurate performance rating and these were used to determine who was to be laid off (R. 2394).

The Trial Examiner found that no general policy or over-all pattern with respect to layoff or refusal to rehire existed (R. 214). The Board adopted this finding.

Evidence on Haddix' Layoff

Madeline Haddix, a member of Lodge 751, was working on the "wash rack" at the time of the strike, went out on strike, and returned on September 13, 1948, to the same job, working under a

woman who had formerly worked under her (R. 881-882). According to Haddix, about a week after her return, the woman over her having complained of her work, foreman James moved her to a similar job on the wash rack upstairs, where she remained for more than a year. She was laid off on October 26, 1949, her termination slip being marked "Laid Off—Surplus employee" (R. 883-884, 887, 896-897; Gen. C. Ex. 73, R. 887).

Haddix testified that a few weeks before her lay-off, assistant foreman Welling remarked that some people would have to be laid off, and, turning to her, said, "The trouble with you is that you belong to the wrong union." (R. 884). Welling denied making any such statement (R. 2687).

James, Haddix' general foreman, testified that after the strike, someone else having taken Haddix' place on the wash rack, he attempted to shift her to a mechanic's job so she could retain her rating, encouraging her to study so she could move ahead (R. 2680-2681). However, after three weeks, Haddix admitted she couldn't perform the mechanic's work and was put back on the wash rack (R. 895, 2681). There, despite James' previous request that she refrain from doing so, she again caused friction with her fellow employees and her quarrelsome nature reasserted itself as a factor in the evaluation of her fitness (R. 2681-2682). As a result, James

moved her upstairs to an opening which he was able to create, where she remained until she was laid off (R. 2681-2682).

James, who was on vacation at the time of Haddix' layoff, testified that the cancellation of the B-54 contract, which created a surplus of employees in his shop, was the circumstance which led to Haddix' layoff (R. 2682), and in particular that she was laid off because there were two employees but only one job of that kind in the shop (R. 2680). Welling testified that the upstairs wash rack job was discontinued at the time of the B-54 cancellation, leaving but one job for Haddix and the other person having the same job title (R. 2684-2687). According to Welling, he and his immediate supervisor, Austad, in determining that Haddix was surplus, considered the comparative abilities of the persons involved, noting Haddix' inability to get along with other people (R. 2684-2686). He said that Haddix' membership in Lodge 751 did not enter into their consideration (R. 2684).

There is no evidence of union activity except that Haddix served as a shop stewardess for two months prior to the strike and helped at the union office during the strike (R. 882).

Haddix Was Laid Off Because of Her Lack of Versatility and Personnel Conflicts

The Trial Examiner credited Haddix' testimony

regarding Welling's remark about her belonging to the wrong union, but concluded that the evidence was not persuasive that her union membership was a consideration affecting her continuation of employment (R. 216). Contrary to the Examiner, the Board found that Haddix was selected for layoff because of her membership in Lodge 751 (R. 277-278). It premised its reversal of the Examiner's conclusion upon the fact that both Welling and James testified that the layoff was occasioned by the B-54 cancellation, whereas in fact this contract was cancelled in April 1949, and resulted in layoffs during April and May of that year, Haddix having been laid off in October. Further, in view of the fact that James was on vacation at the time of the layoff, it concluded that it could attach no weight to James' and Welling's testimony concerning the reasons for Haddix' selection (R. 277).

Accepting as a fact that Welling told Haddix she belonged to the wrong union, nonetheless, we contend, as found by the Examiner, that the evidence is not persuasive that Haddix' membership in Lodge 751 was a consideration affecting her selection for layoff. It is apparent from the record that her general foreman, James, did more than might reasonably be expected of someone in his position to help Haddix and keep her on the payroll. However, Haddix had practically no experience other than working on the wash rack, and she herself admitted that

she knew nothing of mechanic's work. Accordingly, when a surplus occurred and the upstairs wash rack job was discontinued, it is not surprising that a person with her obviously limited capabilities, experience and quarrelsome nature was selected for lay-off.

We believe that the two factors seized upon by the Board in concluding that it could attach no weight to James' and Welling's testimony are without substance. It is true that the layoffs occasioned by the B-54 cancellation occurred in April and May 1949, but the record shows (R. 324-325) that there was another general layoff in the fall of 1949 caused by the B-50 rescheduling, 1462 employees being laid off during October, as was Haddix (Resp. Ex. 38; R. 2258). We acknowledge that Welling and James were mistaken in saying B-54 rather than B-50, but we submit that this understandable error was of minor importance. The Board also noted that James was on vacation at the time of Haddix' layoff. This in no way destroys the weight of his testimony, corroborated by Welling, that a surplus did occur and that Haddix was laid off because there were two employees but only one job in the shop. In any event, final surplusng took place in Heiland's office as more fully discussed, *supra*, pp. 43-44. We conclude that the General Counsel did not meet the requisite burden of proof in this case and submit that the Board's order with respect to Haddix should be set aside.

Evidence on Myrick's Layoff

Claude Myrick commenced employment January 1, 1940, and, except for nine months military service, was continuously employed until the time of the strike, at which time he was classified as "Sheet Metal Worker Maintenance A". He was a shop committeeman from 1943 or 1944 until laid off on October 21, 1949 (R. 1284; Gen. C. Ex. 116; R. 1292).

Foreman Keene testified that in the fall of 1949 there was a sizable shrinkage in the work load, resulting in a reduction from 40 to 25 employees in this shop (R. 3008). Myrick was laid off as the slowest man, over all, then on the payroll in this shop (R. 2987, 3024). At or about the same time that Myrick was laid off, four or five other employees in the same department were laid off, including at least three new hires (R. 3026-3027).

This department was cost conscious because if actual costs greatly exceeded the estimate made by Plant Facilities, this work, unlike the building of airplanes, could, and future work would, be placed with outside shops or contractors (R. 2988). Owing to Myrick's slowness, he consistently exceeded the estimated costs (R. 2291-2292).

Assistant foreman Watling testified that one of Myrick's last jobs exceeded costs between 25% and 30% (R. 2989). Both Myrick's assistant foreman and foreman testified that Myrick frequently en-

gaged in conversation with fellow workers on the job, interfering with his and their production (R. 2993, 3016). Myrick was placed on thirty days' probation in March of 1949 for refusal to observe orders of his supervisor (R. 2991). Myrick admitted criticism as to the speed of his work and acknowledged that his speed was slow, but thought it had improved (R. 1295, 1300).

Myrick signed his performance rating card dated September 14, 1949 (Resp. Ex. 77; R. 3030), which rated him "weak" as to quantity of work and cooperation and conduct, with an over-all rating of "fair."

Myrick Was Laid Off Because of Slowness

The Board based its reversal of the Trial Examiner on Myrick's testimony that, because he was unable to receive, at the time or shortly after receipt of layoff notice, any explanation from his foreman or others of the reason why he was selected for lay-off, the reason must have been because of his position of leadership in Lodge 751 (R. 278-279). It is submitted that Myrick's knowledge of repeated criticisms as to the slowness of his production, his proneness to converse with fellow workers during working time, his probation a few months before for refusal to follow work instructions, and his performance rating were sufficient reasons, without re-

quiring further explanation, as to why he had been selected for layoff.

At the time of Myrick's layoff, Heiland's office considered the ratings accurate and used them in determining layoffs (R. 2394). The Board apparently derives some sinister connotation from the fact that Myrick's selection for layoff was determined by higher echelons of management (R. 278-279).

In view of the Company procedure for selection of persons to be laid off, as detailed, *supra*, pp. 43-44, it is submitted that the reports Myrick testified he received from other supervisors were completely consistent with this policy.

The proper conclusion to be drawn from the record is that Myrick's slowness was the motivating reason for his layoff.

Evidence on McDonald's Layoff

Clyde McDonald was first employed twenty-four days before the strike, went out on strike, did not make application for reemployment until January 10, 1949, when he was reemployed as "Assembler—Wire Group B", and was laid off August 5, 1949 (R. 963). McDonald testified that a Teamster organizer talked to him on several occasions, and finally McDonald told him that he, being an A.F. of L. man for many years, hoped that "if I ever work under the jurisdiction of the A.F. of L. in the Boeing air-

plane factory, it will be under the jurisdiction of the I.B.E.W." (R. 965). McDonald testified that these conversations were on a friendly level "just straight from the shoulder" (R. 969).

He testified that thereafter the organizer went to the shop foreman thirty or forty feet away and engaged in some conversation, but he did not know what was said. In less than thirty minutes McDonald said he received his slip (R. 965-966).

McDonald had one eye (R. 971).

Randall, general foreman over McDonald, testified that in the department where McDonald was employed there were 422 electricians in four labor grades on August 2, 1949, and by November 11, 1949, the number of employees had dropped to 195 (R. 2544); that in the distribution of labor grades there were 102 solderers, the lowest grade on August 2nd, and no solderers on November 11th, resulting in the necessary down-grading of A and B electricians.

Whereas there had been 78 A electricians and 152 B electricians and 90 C electricians on August 2nd, there were 55 A electricians, 124 B electricians and 16 C electricians in November. This reduction was occasioned by the completion of the Stratocruiser and the reduction in the B-50 load.

There were others laid off on the same day as McDonald (R. 2544-2545). Concerning the three laid off, Randall stated that, for the purpose of testifying, he had checked the payroll deduction

records because he had no prior knowledge, and found that McDonald was a member of 751, the second was a member of 451 and the third had no affiliation (R. 2546).

McDonald Was Laid Off Because One of Least Qualified

Based solely upon the testimony of McDonald that he saw a Teamster organizer and the assistant foreman engaged in conversation, the Board infers that the organizer *must* have communicated McDonald's expressed preference for I.B.E.W. and therefore he was laid off because of his opposition to 451. Thus, there is not even hearsay evidence but unadulterated speculation that any of McDonald's supervisors had any knowledge whatsoever of his alleged union preference. This Court aptly said, in *National Labor Relations Bd. v. Amalgamated Meat Cutters*, 9 Cir., 202 F. 2d 671, 673:

"The Board is not permitted to arrive at conclusions based on such speculations."

No charge was ever made nor was the complaint amended at any time following McDonald's testimony to charge Boeing with discrimination against him for his preference for I.B.E.W.

In light of the established Company procedure for laying off surplus employees, it is straining credulity to hold that the proximity of the Teamster or-

ganizer incident played any part in McDonald's lay-off.

It is submitted that an employee with a length of service with Boeing of approximately eight months and restricted physical capacity would normally be selected for layoff for this reason alone in a department having 227 layoffs in the space of three months. Any inference to the contrary is not supportable on the record herein.

Evidence on Schott's Demotion

Dorothy Schott, a "spot welder B" at the time of the strike, returned in October 1948 as a "worker general", was promoted in February 1949 to a "spot welder B", and on April 18, 1949, was downgraded to a "general helper" and assigned to the "wash rack" (R. 1995, 1997). James, Schott's general foreman, testified that there was a surplus of employees when Schott was demoted in April 1949; that higher-rated people were being downgraded rather than laid off; and that Schott voluntarily accepted her downgrade to avoid being laid off (R. 2698).

Schott testified that shortly after she came to work on the day shift, James called her to his office and told her of her demotion (R. 2005-2006). According to Schott, shortly before quitting time the same day, Lawrence, an assistant foreman on the swing shift (R. 2007, 3083), who was not her foreman, came past the wash rack and upon seeing

Schott said, "What in hell are you doing here? You have no business here. They sure have been downgrading you." (R. 1999-2000), and grabbing her button said, "Well, Holy God, you have got the wrong button." (R. 2000)

Lawrence, under whose supervision Schott had worked as a spot-welder before the strike, denied these remarks (R. 3089), and stated that he would not have been surprised to see Schott on the wash rack because, "in spite of the job she had attempted to hold in there, it would be my opinion that Dotty should never have had rated anything better than a helper's job." (R. 3091)

No exception was filed to the Examiner's failure to find Schott's demotion discriminatory; Schott, poorly qualified for her job, accepted a demotion to avoid being laid off as the result of a surplus.

The Examiner credited Schott's testimony regarding Lawrence's remark (R. 220), but failed to find that her demotion was discriminatory. Contrary to the Examiner, the Board found that she was demoted because of her membership in Lodge 751 (R. 279-280).

No exception was filed to the Examiner's failure to find that Schott's demotion was discriminatory (R. 228-258). Thus, we contend that as a matter of law under Section 10(c) of the Act the Board erred in not adopting the Examiner's recommended order with respect to Schott. *Citizen News Co.*, 100

National Labor Relations Bd., No. 84, 29 LRRM 1116.

Secondly, we contend that the Board's finding is not supported by the evidence. The Board based its finding on two factors: (1) Lawrence's comment to Schott that she belonged to the wrong union, and (2) the absence of any explanation concerning the reason for her demotion (R. 279-280). The Board's reasoning presupposes that it reasonably can be inferred from Lawrence's comment that Schott's union affiliation was the motivating reason for her demotion. No such inference is possible, let alone reasonable. Schott admitted that Lawrence was not her foreman at the time of her demotion. There is no showing that he played any part in it whatever. Even the tenor of the supposed remark—surprise at her demotion—belies any such participation. According to Schott, Lawrence was on his way to work on the swing shift when he made the remark, Schott having been advised of her demotion that morning by her general foreman, James. Obviously the Board's finding is based on pure conjecture.

Furthermore, James did explain the reason for Schott's demotion, which occurred in April 1949, at the time of the B-54 cancellation surplus. Rather than lay off higher-rated employees, they were given a chance to move down. Schott voluntarily accepted her demotion in order to stay on the payroll.

It is noteworthy that before the strike Schott had been demoted because she was "found incapable of performing the duties of Spotwelder 'A'," as stated in a memorandum from Boeing to Lodge 751, signed by James and Kaiser, Schott's shop committeeman (Resp. Ex. 30, R. 3370, 2001-2003).

The Board's finding is wholly without support in the record.

4. NIELSEN NOT REHIRED

Boeing did not rehire Nielsen because of her poor work record, not because she had filed a charge.

Evidence on Nielsen

Christina M. Nielsen returned after the strike to her former job as clerk in Shop 701 (R. 1957-1959). In March 1950, between 100 and 125 workers in Nielsen's shop were laid off or transferred as the result of the completion of the B-47 tooling program, and Nielsen was among them (R. 2808-2810). She has never been recalled. On September 5, 1950, she filed a charge asserting that Boeing laid her off on March 3, 1950, and subsequently refused to reemploy her for discriminatory reasons (Case 19-CA-354, Gen. C. Ex. 1-U, R. 297, 1967). The only matter in issue is whether Boeing did not rehire Nielsen after her charge was filed because she filed it (R. 280).

Nielsen, her foreman, Graue, and one of her assistant foremen, Harris, testified concerning her work record prior to her layoff (R. 1954-1978),

2805-2826, 3612-3648); and their testimony was summarized by the Examiner (R. 173-175). In brief, according to Graue and Harris, Nielsen did a great deal of unnecessary talking on the job, as well as considerable "expediting" in an adjacent shop, Shop 442, which was not part of her job, both of which had a very adverse effect on the amount of assigned work she accomplished, which, in turn, caused lost time among other workers, as well as an unbalanced work load in the shop (R. 1976-1978, 2805-2807, 3614-3620, 3630, 3634). Graue (R. 2806-2807) and Harris (R. 3613-3643) testified that her job was limited to writing requisitions for the materials used in her shop and that very little conversation was required. However, Nielsen explained at length that "every requisition meant some conversation" (R. 1975) and, as she saw it, writing requisitions was only a portion of her job—"Steel had to be checked, and substitutions made, and expedited * *'" (R. 1976). She admitted that Harris warned her against doing Shop 442's work and told her to stop checking the availability of steel (R. 1977-1978). According to her, she did stop, except in isolated cases when a mechanic wanted her to do it. (R. 1978). Graue had Harris run a check on the number of requisitions Nielsen wrote per day, which showed an average of about 26 as against 180 written by the girl on the second shift (R. 2805-2806, 3614-3617).

Graue constantly was told by supervisors about Nielsen's lack of interest in her job and continuous talking and the small amount of work she was doing (R. 2805, 2814). Harris, after warning her in vain about unnecessary talking (R. 3618-3619), finally put an action memo about it in her personnel folder (R. 3620-3621). Such memos would be considered in time of surplus in selecting those to be laid off (R. 2807-2808), and go against an employee's record (R. 3626).

According to Nielsen, on March 3, 1950, when she was laid off, Harris told her she would not be needed any further (R. 1959) and, when she complained to Graue, he said that according to her records there were no complaints about the quality of her work, but there were as to quantity (R. 1959-1960). She then went to Cottet, employment interviewer supervisor (R. 3913), whom she knew, asking about the proper procedure for getting back on, and after she told him her termination slip was marked "Lay-off," he said, according to her, that she would be recalled in a routine manner when the work load would make it necessary, "or something to that effect" (R. 1966).

According to Nielsen, shortly before September 5, 1950, the date she filed her charge, she talked to Fouty, Lodge 751 business representative (R. 2228), and had him call Huleen, assistant labor relations manager (R. 1967-1968, 3259). Fouty told Nielsen

that Huleen said he would call him back with a report (R. 1968). She testified that before Huleen did so, she filed her charge, asserting that Boeing had laid her off on March 3 and since refused to reemploy her because of her membership in and activities on behalf of Lodge 751. Very shortly thereafter she told Cottet she had just filed the charge and asked him to check on her desirability for rehire (R. 1968-1969). He referred the matter to Huleen, who called Nielsen and, according to her, told her that she was undesirable for rehire at that time, that she had a poor work record, and something else which she didn't understand and couldn't remember (R. 1969). Within a month she called Huleen, and, according to her, he said it would be pointless for her to see him because "my work record would in no way encourage a rehire" and, although the Company might take her back if the need were very great, "at the present time there was no reason, in fact, to think I would be desirable for rehire" (R. 1969-1970). She then saw Graue and, she testified, asked him "if he could *alter* my record to make me available for rehire" and he said he would see (R. 1970). A week later she called Huleen, who told her he had talked to Graue and that this talk had not altered her status (R. 1971). Later she sent a written statement to Huleen, through Fouty, and Fouty advised her that Boeing was still not interested in rehiring her

(R. 1971). That was her last contact with the Company (R. 1971).

Huleen testified that he was first contacted concerning Nielsen's rehire possibilities after September 1, when Fouty called (R. 3923). He then reviewed Nielsen's file and found that she had been given a low performance rating prior to her layoff, which carried a notation that she was generally prone to disregard plant rules (R. 3923, 3925). He also recalled finding Harris' memo regarding her unnecessary conversation (R. 3925). After he reported this information to Fouty, Cottet called him and told him that Nielsen had come in to see him and that he was referring the matter to Huleen (R. 3924). The following day Huleen called Nielsen at her home and advised her that in the Company's opinion there were other people more qualified for the available openings and that Boeing had found that she engaged in unnecessary conversation on the job (R. 3924). About two weeks later a summary of her work record, including the criticism regarding her proneness to unnecessary conversation, was prepared by the superintendent of her shop and placed in her file at the employment office (R. 3924-3925).

Nielsen Not Rehired Because of Poor Work Record

The Examiner found that there was no substantial evidence that Boeing's failure to rehire Nielsen was unlawfully motivated (R. 215). Contrary to the

Examiner, the Board found that beginning in September 1950 and thereafter, Boeing did not rehire Nielsen because she had filed a charge, thereby violating Sections 8(a)(4) of the Act (R. 280).

Since Nielsen's charge was filed on September 5, 1950, the decisive question is whether after that date the filing of the charge became the motivating reason Boeing did not rehire her. Although the reason Boeing laid her off in March and did not rehire her prior to September 5 is not in issue, we believe the record conclusively shows it to have been her proclivity for unnecessary conversation and her poor performance on the job. The Board has not found otherwise. We contend that her poor record continued to be the motivating reason for not rehiring her after September 5. In any event, we submit that there is not the slightest evidence in the record from which it can reasonably be inferred that Nielsen's charge ever had anything whatever to do with her reemployment possibilities at Boeing. We think it clear that the Board's conclusion is mere speculation, but we wish to point out some of the fallacies in what appears to be the reasoning underlying the Board's failure to accept the Examiner's finding.

In support of its finding the Board purported to detect some change in what Boeing advised Nielsen before and after her charge was filed, as to the possibility of her being rehired (R. 280). It relied on

Nielsen's testimony that shortly after her layoff Cottet told her she would be "recalled in a routine manner when the work load would make it necessary" or something to that effect (R. 280, 1966). It is apparent from Nielsen's testimony that Cottet did not examine her personnel folder before making this offhand remark because he had to ask Nielsen what type of termination slip she had and what it said (R. 1966). Even if he then knew of her poor record, we submit that his remark was appropriate. Furthermore, Nielsen did not purport to remember his exact words (R. 1966).

To show a change in Boeing's attitude after the charge was filed, the Board relied on what Nielsen said Huleen told her, namely, that "my work record would in no way encourage a rehire" and "at the present time there was no reason, in fact, to think I would be desirable for rehire" (R. 280, 1970). Even assuming that Nielsen could remember the precise words Huleen used, we think it obvious that they do not show any change in Boeing's attitude toward her nor belie a continued failure to take her back because of her poor record.

The Board also observed that Graue's testimony establishes that there was nothing in her record to *prevent* her rehire (R. 280). Of course this is true in the sense that her record does not disclose something, such as dishonesty, which would absolutely

prevent her rehire. However, it is perfectly consistent with the position taken by Boeing.

This is a case where the demeanor of the witness has particular significance. The Examiner could rightly conclude that Nielsen's proclivity for conversation and resulting inefficiency was the *real* and sufficient reason why Nielsen was not rehired. See, for example, R. 1977-1978. It is significant that General Counsel abandoned her case in his brief before the Board, thus lending further support to our argument based on demeanor. The Board, viewing the printed record, resorts to artificial refinements of the precise words spoken by the witness, when the witness herself did not pretend to be doing more than relating the substance of conversations.

5. ASSISTANCE AND SUPPORT OF LOCAL 451

Before considering the evidence, it seems necessary to outline the Board proceedings with respect to this issue. It was alleged that Boeing unlawfully dominated, assisted, sponsored, maintained and contributed support to the Teamsters, Local 451, both during and after the strike (R. 26-27). The Examiner failed to find that any of Boeing's acts during the strike were unlawful (R. 218-219) and specifically that there was no evidence that Boeing had ever dominated Local 451 (R. 220). However, based upon the evidence as to three specific acts, namely, (1) Local 451 employment referrals, (2) Klein's

dues deduction, and (3) Carrig's promotion, the Examiner found that for a time following the end of the strike Boeing assisted and supported the Teamsters (R. 219-220). The Examiner's findings and conclusions were adopted by the Board without change or comment (R. 270). In addition, the Board found that the discharge of Gerber constituted additional unlawful assistance and support (R. 277). If the Board's finding with respect to Gerber's discharge is reversed, as we have urged elsewhere herein, that will also dispose of this particular issue. Accordingly, we make no further argument at this point. With this introduction, the evidence may be considered.

Evidence on Teamster Referrals

In aid of its effort to recruit additional employees during and after the strike, Boeing had referral arrangements with six or seven large employers and labor organizations in Seattle, including Local 451, whereby persons seeking employment were referred to Boeing (R. 352). The Board found that Boeing's referral arrangement with Local 451 did not violate the Act (R. 219). However, it concluded, on the basis of the testimony concerning five persons referred to Boeing by the Teamsters, that for a time individuals referred by that union were preferred for employment over those without such reference (R. 219). The five referrals on which the Board

relied in making this finding, with references in each case to the findings summarizing the testimony, and the testimony, were:

Klein (R. 189-190, 2045-2048, 3915-3916).

Brody (R. 190-191, 2110-2113, 3947-3948).

Courtier (R. 190-191, 2110-2113, 3913-3914).

Boitnott (R. 191, 2118-2121, 3946-3947).

Heston (R. 193, 2032-2034, 3914-3915).

In the interest of brevity we will not review this testimony in detail.

In general, each of the five testified that following the strike he applied for employment at Boeing with an employment referral from Local 451 and was hired.

Evidence on Klein's Dues Deduction

The second act on which the Board relied in finding unlawful assistance and support was that Boeing declined to permit Klein to cancel his Local 451 dues deduction authorization at a time when the rules published by Boeing for the guidance of employees provided that such a deduction could be cancelled at any time upon written notice (R. 193-194, 219). Klein, a member of Local 451, was employed on February 4, 1949 (R. 3915). He testified that after one month he attempted to cancel his dues deduction authorization (R. 2048). He was told by the Company that he could not do so because he had signed an authorization covering a period of one

year and there was nothing the Company could do about it (R. 2049).

In November, 1948, Boeing published and distributed to its employees a booklet entitled "For Your Information" (Resp. Ex. 44; R. 2303-2304). This booklet was distributed to inform employees of the general terms and conditions of their employment, there being no collective bargaining agent or agreement at that time. Eight different types of payroll deductions, including "Union Dues", which the Company was willing to make when authorized by the employee, were listed in this booklet. Following this listing appeared this statement: "You may cancel any deductions you have authorized by giving a written notice to the Company."

Mr. Graham, secretary and treasurer of Local 451 at all times since September or October, 1948, and responsible for the administration and operation of that organization, was called as a witness by the General Counsel (R. 2924-2925). He testified that until early in 1949 the dues deduction authorizations used by Local 451 were revocable, but that at that time they commenced the use of irrevocable authorizations (R. 2930).

Evidence on Carrig's Promotion

The third act on which the Board relied in finding unlawful assistance and support was the denial of Carrig's promotion to a supervisory position, al-

legedly because the promotion was opposed by Local 451 (R. 219).

The only evidence on this issue is Carrig's testimony (R. 2192-2205), which was accurately summarized by the Examiner (R. 191-193). In substance, Carrig, a relief timekeeper, testified that in December, 1948, his supervisor, Morrell, chief timekeeper, selected him for promotion to a supervisory job. However, he was not promoted. According to Carrig, Morrell told him that his promotion was blocked by higher management. Carrig said Morrell told him Boeing's treasurer said, "* * * it looked like Mr. Logan [Vice President] was in bed with the Teamsters" (R. 2199).

No Preference Shown Teamster Referrals

The Board's conclusion that individuals referred by Local 451 were preferred for employment over those without such referrals is purely speculative. Thus, Klein applied in January, was told he might be called, returned in February with a referral, and was hired. Obviously, the effect of the referral is purely conjectural. Courtier and Brody applied in September during a period when the Company had suspended hiring new applicants in order to return strikers to the payroll as soon as possible. When they returned in October with referrals, the Company had resumed hiring and they were hired. Again, the effect of the referral is conjectural. Boit-

nott applied twice on the same day, but filled out a new application and talked to a different interviewer on the second occasion. In the interim, a job requisition may have been filed with Personnel or the two interviewers could reasonably have differed in evaluating his potential. This, as well as the evidence relating to Heston, is merely circumstantial and entitled to little weight. We submit that the evidence does not preponderate in favor of the inference drawn by the Board. Evidence to be weighed against this conclusion is the testimony of six other persons that they had 451 referrals and yet did not succeed in securing employment (R. 2150-2151, 3937; Resp. Ex. 22, R. 1222; Resp. Ex. 19, R. 941-943; R. 462, 464, Resp. Ex. 12, R. 467; Resp. Ex. 15, R. 806-807).

Klein's Authorization Irrevocable

In finding that the Company's refusal to permit Klein to cancel his dues deduction authorization was unlawful, the Board relied on the fact that the Boeing rules then in effect permitted such cancellation (R. 219). It is clear from Graham's testimony that Local 451 adopted the irrevocable authorization forms after the rule booklet was published. Thus, the rule was simply out-of-date at the time Klein requested that his authorization be cancelled.

In any event, the Board has not found that Klein's union dues authorization was revocable. In view of

the adoption of the irrevocable form early in 1949 (R. 2930) and Klein's testimony, credited by the Examiner (R. 194), that he was told that his authorization was irrevocable for one year (R. 2049), we submit that the record establishes that Klein signed an irrevocable authorization on February 3, 1949 (R. 2049-2051, 3915). Section 302(c) of the Act recognizes the validity of authorizations irrevocable for one year where there is no collective bargaining agreement in effect. Thus, Boeing was powerless to cancel Klein's authorization.

Denial of Carrig's Promotion Insignificant

The only evidence in the record in support of the Board's finding that Carrig's promotion was denied because of Local 451's opposition is Carrig's testimony of the conversations between third parties related to him by Morrell. Clearly this is hearsay evidence having no probative value to establish the truth of what the third parties said. *National Labor Relations Bd. v. Amalgamated Meat Cutters*, 9 Cir., 202 F 2d 671. Boeing excepted to the Examiner's reliance on Carrig's testimony on this ground (R. 266), but the Board adopted the Examiner's finding without comment. The Examiner treated Morrell's remarks as admissions by Boeing (R. 219). Such statements by an agent are admissible against his principal to prove the truth of the facts asserted only if the agent was authorized to make the state-

ments or to make true statements concerning the subject matter. *Restatement of the Law of Agency*, Section 286. Although Morrell may have been authorized to recommend Carrig for promotion and to advise him that he had not been promoted, we contend that there is no evidence in the record from which it reasonably can be inferred that he was authorized to make statements concerning the reason Carrig was not promoted.

Even if Morrell's statements to Carrig are treated as admissions, they do not support the Board's finding. When asked what Morrell told him Logan's reasons for turning down his promotion were, Carrig also said, "Oh, it was due to union activity. They were concerned or quite put out about my activities during the strike." (R. 2198). Carrig said that he was on the Lodge 751 public address system for a week and that the Company particularly objected to this (R. 2198-2199). Thus, it is purely conjectural that the supposed opposition of Local 451 was the motivating reason for denying Carrig's promotion. In any event, the incident is so trivial as not to amount to assistance and support.

In conclusion, with respect to this issue we submit that the evidence relating to the minor acts relied upon by the Board does not preponderate in support of its finding that Boeing unlawfully assisted and supported Local 451.

6. STATUTE OF LIMITATIONS

Allegations as to Haddix, Myrick, McDonald and Schott are barred by Statute of Limitations.

We contend here, as we did before the Examiner (answer, R. 51; motion, R. 52) and the Board (exception 1, R. 259), that the allegations in the complaint pertaining to the layoffs of Haddix, Myrick and McDonald and the demotion of Schott are barred by the six-months' statute of limitations prescribed by Section 10(b) of the Act. We urge that these allegations are not based on timely charges of sufficient breadth to support them. Briefly, the allegations we challenge are those alleging:

1. Haddix' layoff on October 21, 1949 (par. XVI, R. 13-15)—added by first amendment to complaint (Gen. C. Ex. 1-E, R. 296), issued April 23, 1951.

2. Myrick's layoff on October 21, 1949 (par. XVI, R. 13-15)—added by second amendment to complaint (Gen. C. Ex. 1-NN, R. 298), issued May 24, 1951.

3. McDonald's layoff on August 9, 1949 (par. XVI, R. 13-14)—alleged in original complaint (Gen. C. Ex. 1-Z, R. 297), issued on March 29, 1951.

4. Schott's demotion on April 18, 1949 (par. XXIII J, R. 25)—added by third amendment to the complaint (Gen. C. Ex. 1-QQ, R. 298), issued on June 15, 1951.

Haddix, Myrick and Schott were not named in

any charge filed before the above allegations were added to the complaint. Subsequently, Haddix, Myrick and McDonald were named in the amendment to charge No. 19-CA-175 (Gen. C. Ex. 1-M, R. 296), filed June 15, 1951. Schott has never been named in any charge. Although it was asserted in charge No. 19-CA-175 (Gen. C. Ex. 1-K, R. 296), filed March 15, 1949, that Boeing failed to rehire McDonald after the strike, he was rehired in January 1949, and his subsequent layoff on August 9, 1949, was not charged until June 15, 1951, as above noted.

It is apparent that none of the allegations in question was charged or added to the complaint within six months of the occurrence of the alleged unfair labor practices, as was the case in *National Labor Relations Bd. v. Globe Wireless Ltd.*, 9 Cir., 193 F. 2d 748.

Clearly these allegations are barred unless this Court holds that some prior charge forms a sufficient basis for their issuance.

The relevant prior charges are:

1. No. 19-CA-135 (Gen. C. Ex. 1-A, R. 1), filed on September 20, 1948, relating to the Teamsters and Cinotto and Burrell.

2. No. 19-CA-175 (Gen. C. Ex. 1-K, R. 296), filed on March 15, 1949, asserting certain refusals to rehire, discharges, and reemployments to lesser jobs.

Both of these charges were filed before the occurrence of the alleged unfair labor practices. The

Board's decision (R. 63), holding that charge No. 19-CA-135 forms a sufficient basis for the entire complaint, appears to be based on the premise that, once a charge has been filed against an employer, a complaint may thereafter be issued at any time alleging any number of unfair practices regardless of what relationship, if any, the practices alleged bear to those asserted in the charge. We recognize that a complaint may untimely enlarge upon a *timely* charge under the "relation back" theory *under certain circumstances*. (*National Labor Relations Bd. v. Martin*, 9 Cir., F. 2d, 33 LRRM 2046 (October 19, 1953)). However, relation back is possible only where "the violation and the facts constituting it remain the same" (*National Labor Relations Bd. v. Gaynor News Co.*, 2 Cir., 197 F. 2d 719, 721), the new matter is "inherent in or connected with the original charge" (*Kansas Milling Co. v. National Labor Relations Bd.*, 10 Cir., 185 F. 2d 413, 415), or is "based upon a closely related factual situation" (*National Labor Relations Bd. v. Kobritz*, 1 Cir., 193 F. 2d 8, 15), or where a "continuing violation," such as the continuing enforcement of an illegal contract (*Katz v. National Labor Relations Bd.*, 9 Cir., 196 F. 2d 416), or repeated refusals to bargain (*National Labor Relations Bd. v. White Construction Co.*, 5 Cir., 204 F. 2d 950), are involved. It is clear that the "continuing violation" theory does not apply to a layoff, demotion, or a subsequent failure

to rehire (*National Labor Relations Bd. v. Pennwoven, Inc.*, 3 Cir., 194 F. 2d 521; *National Labor Relations Bd. v. Childs Co.*, 2 Cir., 195 F. 2d 617), and we submit that the allegations are not sufficiently connected with the matters asserted in charge No. 19-CA-135, or any of the other charges in this case, to relate back. To hold otherwise is to render the six-months' proviso virtually meaningless in disregard of the legislative purpose to afford employers some measure of protection against stale charges. *Legislative History of the Labor Management Relations Act* (1947) Vol. 1, pp. 331, 432, 557. Since this is a statute of limitations, whether or not Boeing was prejudiced by having to defend these untimely allegations is irrelevant.

7. THE OMNIBUS ORDER UNWARRANTED

The activities of Boeing, as shown by the record in this case, do not indicate a purpose to defeat the self-organization of its employees and are not potentially related to future unfair labor practices. The issuance of a broad cease and desist order is unwarranted.

The background of this entire proceeding has been fully discussed, including the number of cases, length of the hearing, and the final result. As the Board decision now stands, Boeing has been found guilty of violating Sections 8(a)(1), (2), (3) and (4) of the Act in several instances. Even assuming that all counts will be affirmed by this Court, the

few specific cases should be viewed in proper focus. The history, climate of the times and subsequent circumstances are vital factors to be considered in determining whether a broad order is warranted. Placing the few specific cases in perspective with the following factors: (a) the long strike, engendering hostility between those who worked and the returning strikers, (b) the working force, ranging from 14,000 to 20,000, (c) the alleged unfair practices, occurring within a relatively short period following the strike, (d) no Company history of anti-union bias, and (e) the amicable relations between Boeing and the complaining union, Lodge 751, since 1950, demonstrates that no broad order is warranted.

During the course of the Examiner's hearing, the General Counsel cautioned the hearing officer lest he prejudge the individual cases, thereby missing the over-all pattern of discrimination, which he contended existed, against Lodge 751 members. The Examiner's disposition of General Counsel's contention was unequivocal. After listening to the witnesses for a period of three months and preparing a detailed Intermediate Report, he concluded:

"I am not convinced that such a general policy existed." (R. 214).

This finding was adopted by the Board (R. 270).

As to the remedy, the Examiner, based on his

first-hand knowledge of the entire record, categorically stated:

“As the record does not indicate a general disposition to violate the Act, a broad cease and desist order will not be recommended.” (R. 223)

Although the General Counsel took exception to this recommendation, he advanced no argument on this issue to the Board. Despite the foregoing, the Board issued a broad order (R. 283-284, 286).

We recognize that the Board is vested with authority to fashion a remedy. However, it may not act arbitrarily. Furthermore, the Trial Examiner's findings are now, under the decision in *Universal Camera Corp. v. National Labor Relations Bd.*, 340 U.S. 494, 496, to be given greater weight than theretofore. The Trial Examiner, having heard the evidence, seen the witnesses and lived with the case, is best qualified to determine Boeing's “general disposition,” and his findings should not be disturbed unless error is clearly shown.

In *Wyman-Gordon Co. v. National Labor Relations Bd.*, 7 Cir., 153 F. 2d 480, 483, the court held that where the Board disagreed with the Trial Examiner's findings and recommendations,

“* * * such contrariety of views may be properly taken into consideration, in fact, [we think] that it has a material bearing upon the question as to whether the Board's findings are substantially supported.” (citing cases)

In *National Labor Relations Bd. v. Express Publishing Co.*, 312 U. S. 426, 433, the court defined the

Board's authority as not broad enough to permit an order restricting:

"* * * generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct."

Continuing, the court said at p. 435:

"But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged."

See also *May Department Stores Co. v. National Labor Relations Bd.*, 326 U. S. 376, 392.

This Court has applied the *Express Publishing Co.* rule and refused to enforce omnibus orders without a clear determination by the Board of an attitude of opposition to the purposes of the Act to protect the rights of employees generally.¹

In *National Labor Relations Bd. v. Walt Disney Productions*, 9 Cir., 146 F. 2d 44, this Court considered a broad cease and desist order and declined enforcement, observing:

"This command is but a repetition of the statutory rights of employees which employers are bound to respect. The employer cannot by such

¹*Richfield Oil Corp. v. National Labor Relations Bd.*, 9 Cir., 143 F. 2d 860; *National Labor Relations Bd. v. Kinner Motors*, 9 Cir., 152 F. 2d 816, modified on other grounds, 154 F. 2d 1007; *National Labor Relations Bd. v. Van de Kamp's, etc., Bakers*, 9 Cir., 152 F. 2d 818, modified on other grounds, 154 F. 2d 828.

a blanket order be put in danger of being hailed into court upon a citation for contempt for any subsequently alleged violation of the Labor Act without accusation and trial before the Labor Board.

We confidently expect a reversal by this Court of all, or at least most, of the Board's decision, but again assuming complete affirmance, the record does not approach the flagrant situation considered by this Court in *National Labor Relations Bd. v. Cowell Portland Cement*, 9 Cir., 148 F. 2d, 237, wherein the respondent shut down its plant and discriminatorily discharged all of its employees to compel them to disavow the exclusive bargaining representative with whom the company refused to bargain and to become members of a new company-sponsored local with whom it made an illegal, closed shop contract. These were held violations of Sections 8(a) (1), (3) and (5) of the Act. With respect to the broad order, this Court said, at p. 244:

"This in effect is a blanket order restraining respondent from violating the statute in any manner. We think such a blanket order unwarranted and decline to enforce it."

As Judge Hand said reversing the Board in *National Labor Relations Bd. v. James Thompson & Co., Inc.*,F. 2d, 22 LW 2254, 2255 (December 2, 1953) when the Board reversed the Examiner:

"Over and over again we have refused to upset findings of an examiner that the Board has affirmed, * * * because we felt bound to allow for the possible cogency of the evidence that

words do not preserve. We do not see any rational escape from accepting a finding unless we can say that the corroboration of this lost evidence could not have been enough to satisfy any doubts raised by the words, and it must be owned that few findings will not survive such a test."

We submit that the Examiner was in a better position to ascertain the intangible "general disposition" of the Boeing organization than the Board, which merely reviewed a printed record. Upon the whole record, the issuance of an omnibus cease and desist order is arbitrary and capricious.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition to set aside the Board's order should be granted and that the petition for enforcement should be denied.

Respectfully submitted,

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APPENDIX

The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136; 29 U. S. C. A. Sec. 151, *et seq.*) are as follows:

“UNFAIR LABOR PRACTICES

“Sec. 8.(a) It shall be an unfair labor practice for an employer—

“(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

“(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

“(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the

Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

“(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

“PREVENTION OF UNFAIR LABOR PRACTICES

“Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *

“(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days

after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, * * * Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint * * *

“(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.* * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period

as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

“(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Sec. 302 * * *

“(c) The provisions of this section shall not be applicable * * * (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from such employee, on whose account such de-

ductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner;* * *

Aero Mechanic—September 16, 1948

(Resp. Ex. 69)

"On Monday morning, when strikers first appeared at the Boeing plant for reinstatement, the huge crowd of loyal Aero Mechanic members completely filled both sides of 15th Avenue So. They arrived shortly after 6 o'clock in the morning, with their cars filling the parking lots, and took stands alongside the main gate.

The Seattle Police Department was there in full force, with so many uniformed officers in attendance that onlookers wondered if there were any police left to protect the rest of the city. Besides the scores of patrolmen, there also was a regiment of 30 motorcycle officers. In addition, there were scores of Company guards within the gates, stepping on each other's feet.

When the members of Boeing's 'permanent team'—the strikebreakers—appeared on the horizon, the strikers greeted them with shouts and calls. They were described as strikebreakers, and people without souls, and by many other vivid but descriptive terms.

It had been expected that a number of strikebreakers would appear, but it was apparent that the majority of them must have become frightened away by the huge number of Aero Mechanic strikers and stayed away. It later was learned that score on score of strikebreakers stopped their cars on Boeing Hill, overlooking the plant, and remained on the hill watching the proceedings rather than force their feeble courage into allowing them to brave the looks of contempt in passing loyal Union people.

"The Union loudspeaker carried the refrain of numerous tunes to strikebreakers as they scurried thru police lines. These tunes were, 'Who's Sorry Now,' 'I'll Be Glad When You're Dead You Rascals, You,' and the 'Old Gray Mare She Ain't What She Used to Be.'

The Teamster puppets, those unfortunate strikebreakers who have signed up with the Teamsters Union, were greeted by the Union loudspeaker with the words, 'Here come those mule skinnners, warehousemen and stable boys.' "

In the
United States Court of Appeals
For the Ninth Circuit

BOEING AIRPLANE COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF INTERVENORS
JOSEPH A. PEPIN AND PETER PIOLI

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In the
United States Court of Appeals
For the Ninth Circuit

BOEING AIRPLANE COMPANY, a corpora-
tion,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 13802

BRIEF OF INTERVENORS

I. JURISDICTIONAL STATEMENT

This case is before this court upon the petition of Boeing Airplane Company, and is based upon grounds set forth in the opening brief of the petitioner Boeing Airplane Company, pages 1 to 3, which, by reference thereto, we hereby adopt. The propriety of a joint petition on behalf of these intervenor parties adequately appears from the fact that they are aggrieved by the order of the National Labor Relations Board issued March 26, 1953, which Order and Decision is to be found set forth in full in transcript of record, page 269 *et seq.* In its Order and Decision, the Board held Boeing Airplane Company guilty of certain violations of sections 8 (a) (1), (2), (3), and (4) of the Act, and ordered and directed Boeing to reinstate some 8 former employees and to make them whole for loss of pay during the period of their unemployment intervening since their discharge. These petitioning intervenors were included

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within the group of employees of the Boeing Airplane Company in the proceedings before the National Labor Relations Board below, and they appeared personally at the trial conducted on and following January 3, 1952, before Trial Examiner Wallace E. Royster and testified therein. The finding of the Trial Examiner rejecting their petitions for reinstatement was affirmed and adopted by the Board, and as a result thereof these intervenors become and are parties aggrieved under the Act, section 10 (f) and by reason thereof this court has jurisdiction to review the Board's order denying them reinstatement and recovery for back pay. This review is governed by the said section of the Act and by the Administrative Procedure Act (5 U.S.C. §1001 *et seq.*).

II. STATEMENT OF FACTS

Without accepting argumentative allegations or conclusions contained therein, we do however make reference to the statement of facts in the brief of petitioner Boeing Airplane Company, pages 3 to 11, and therefore do not further here notice the general factual background of this controversy. The particular facts affecting the status of these intervening parties will be more specifically considered in our discussion under the topic "Argument," *infra* p.

III. QUESTIONS INVOLVED

1. Whether the evidence supports the finding that the complaint as to intervenors Pepin and Pioli be dismissed.
2. Whether the Trial Examiner, in determining the testimony of supervisor Morrell unworthy of belief in

one situation, is justified in accepting his testimony as the sole basis for denying relief to Pepin in another situation.

3. Whether the Trial Examiner's conclusion, adopted by the Board, can logically and legally be based on his findings of fact.

IV. SPECIFICATIONS OF ERROR

The Board erred:

1. In holding that the termination of Pepin and Pioli was lawful. (Pepin R. 163; 217; Pioli R. 69-71; R. 199.)

2. In refusing to order Boeing to reinstate and make Pepin and Pioli whole for loss of pay.

3. That as to intervenors Pepin and Pioli, the Order and Decision of the Board denying them relief is arbitrary and capricious, and is not supported by substantial evidence considered upon the record as a whole.

V. ARGUMENT

1. Joseph A. Pepin

The Trial Examiner, in his report and recommendations, held that the Company was warranted in discharging a considerable number of its employees. The Board affirmed the Trial Examiner in his findings with the exception of 3 employees whom it held had been illegally discharged, and whose reinstatement the Board ordered. Among these 3 was one Arthur C. Gerber. The Trial Examiner sought to sustain the Company in discharging Gerber upon the basis and the weight accorded by him to the testimony of the Company's witness, a supervisor Lynn Morrell. The Board, however, ex-

plicitly overruled the Trial Examiner in this finding and found the witness Morrell as non-creditworthy and "not entitled to credence":

"The foregoing facts convince us, and we find, that Morrell was not responsible for Gerber's discharge. We base this finding on the fact that although at the hearing Morrell alone took responsibility for initiating the discharge, his testimony concerning the circumstances of the discharge, as found hereinbefore, *is not entitled to credence* * * * " (R. 275-277) (Italics ours.)

Was not Morrell equally as unworthy of credit in Pepin's case as he was in Gerber's? Can the Board make "fish of one and fowl of the other?" Pepin's status stood exactly upon the same ground as Gerber's. Did not and does not the record preponderate, as it does in Gerber's case, against supervisor Morrell's credibility? Pepin was a time-keeper and the witness Morrell was his supervisor. Pepin testified without contradiction that there had been no criticism of his services as a time-keeper following the strike (R. 1781-1793). The only testimony offered against Pepin was that of the witness Morrell. Morrell's vague testimony (summarized by the Trial Examiner (R. 163-165), containing complaints against Pepin, most of them occurring prior to the strike and therefore irrelevant to the controversy here, was contradicted by Pepin and unsupported by any other witness. Up to the moment of his discharge, Pepin was given no intimation that his services were unsatisfactory. In fact, he was praised, for Lynn Morrell stated: " * * * as a reward for my demeanor, that he would give me back my third shift, which he knew I

preferred" (R. 1784-1788). Pepin's version of the discharge was corroborated by witnesses Powell (R. 3491), Miller (R. 4373), Meredith (R. 4375), and Sullivan (R. 4396). Obviously, therefore, Morrell's testimony stood alone. Yet, though thoroughly discredited by the Examiner in his testimony with reference to Gerber, both the Examiner and the Board relied upon him, to the exclusion of the preponderance of the testimony against him, to support Pepin's discharge.

Morrell is impeached by the uncontradicted evidence of the company itself. At the time of his discharge, the company delivered to him a termination slip. That slip was not based upon any of the complaints, *ex post facto* set up by Morrell in his testimony. On its face it negatives those complaints for it shows that the reason for his termination was "*Laid off for lack of work*" (Ex. 159, 8. 1780, 1784, 1785).

That there was anti-union animus against Pepin is evident from the record. Note testimony of Kelly De Priest, formerly an official in the union but at the time of the discharge herein an organizer for the Teamsters. He taunted Pepin with the prediction that within a short time Pepin, who openly wore the union's button on his lapel, would be let out. Then, too, at the time of his discharge, on the ground of lack of work, it is apparent that the company retained all other timekeepers—even those hired after Pepin was employed (R. 1786-1787).

Another fact that appears equally without contradiction is that Morrell strictly enjoined upon Pepin an obligation not to engage in any union activity on the

company premises, but allowed another timekeeper, an officer in the rival Teamsters' union, to promote membership in the latter union very extensively on company time (R. 1791, 1794).

Let us add another significant factor: Despite the elaborate system of personnel records maintained so extensively by the company, neither the company nor Morrell produced any evidence whatsoever from the personnel files in Pepin's case. This is true although he worked for the company over eight years. Yet, in the case of other employees and other timekeepers throughout the record, personnel records offered in evidence were extensive and profuse.

Another inconsistency which impeaches the value of Morrell's testimony is the fact that the complaints as to which he testified were largely prior to the strike; yet we find Morrell quite willing to rehire Pepin after the strike and retain him for a period of a year thereafter. Clearly, then, the reasons given in Morrell's testimony were not his real reasons; they were nothing but his own self-serving afterthought or his attempt to rationalize the obvious inconsistency in his position. After all, Pepin's discharge—which Morrell seeks to place upon the basis of these complaints, largely prior to the strike—was timed not in connection with such complaints but rather with relation to the spirited, bitterly contested representation campaign waged in the plant after the strike. The discharge significantly was just prior to the election, at a time when he was well known for his opposition to the Teamsters' abortive organizational campaign. Pepin was a marked man and was branded

as a partisan of Lodge 751 and an opponent of the Teamsters.

A more particular reference to record testimony may be helpful.

Pepin testified that Emery Schell, his immediate supervisor, handed him his termination slip (R. 1784). The slip indicated that Pepin was "Laid Off" due to "Reduction in working force" (R. 1784) (G. C. Ex. 159). Schell stated, when he presented the slip to Pepin, that he had no prior knowledge of it and did not believe that Morrell knew anything about it previous to that date (R. 1784), Schell was not called as a witness. At the time of Pepin's layoff, the respondent retained timekeepers hired after him (R. 1787). Pepin also testified, without contradiction, that there had been no criticism of his work as timekeeper following the strike (R. 1787-8). According to Pepin, approximately one month before his layoff, Kelly DePriest, still on leave as a Teamster organizer, offered to bet Pepin that Pepin would not be with the respondent in six weeks (R. 1787-8).

Morrell was the only witness called by the Respondent to testify concerning the discharge of Pepin. Morrell's testimony in Pepin's case is so revealing of the character of the man as a witness that it is reproduced in some detail.

On direct examination, without first ascertaining whether Morrell had any responsibility for Pepin's lay-off, counsel for the respondent asked Morrell whether he ever criticized Pepin. Morrell then related the fol-

lowing four incidents, each of them too remote to prove a moving factor in his discharge.

- (1) “Well, one time he was caught playing poker down in the tunnel with some other employees.

Q. This was during working hours?

A. Yes, I think it was right after, *overstaying his lunch period* it was, I believe.”

- (2) “And then he was one time caught going through the Company’s mail—caught by a guard, caught in the mail room.

Q. What do you mean, going through the Company’s mail room?

A. Well, in the mail room—he was discovered in our mail room, looking through different envelopes and so on, to see what he could see, in the mail room.

Q. Those were sealed envelopes, you mean?

A. Oh, yes; they were sealed and unsealed * * *.”

- (3) “Yes, he was caught a couple of times, leaving his work area early.”
- (4) “And I know one thing in particular, that I allow timekeepers to come in early to watch the clock—in other words, to watch the new hires or the employees that come to work in the morning, to help new employees, to help them find their clock cards, and so on. And we pay them one-tenth early; and the one-tenth is six minutes; and our union agreement called for a person working for four minutes of a tenth was to receive pay for the full tenth. So then I noticed in checking Mr. Pepin’s clock card *that he was always just two minutes into the tenth; in other words, he would just work four minutes of the tenth instead of the full six minutes.* And I had

to send a letter out to the effect that unless they spent the full six minutes at the clock, they wouldn't get paid for the full tenth. So he brought up the question that all you have to work is four minutes; and that is all I am going to do—in other words, not going into the spirit of the order of the overtime in working a full six minutes; so I took him off of overtime entirely.” (R. 2704-6)

The overtime incident, since it involved Lodge 751's contract, manifestly took place before the strike (R. 2706). Pepin was laid off before any contract was executed after the strike. Morrell also testified that Pepin would not work overtime except at his own convenience (R. 2706). This was a general accusation, unlimited in time, but preceded the strike, since as noted, just above, Morrell took Pepin off overtime entirely before the strike. Morrell conceded that under the contract which was in effect before the strike, overtime was not compulsory (R. 2711).

Morrell took credit for the layoff of Pepin (R. 2708). We are left to infer that the four incidents detailed above were the reasons. But, on cross-examination, significantly enough, it developed that *all the above-enumerated criticisms took place sometime before the strike* (R. 2708-9, R. 2710-11), the poker incident being three years before the strike (R. 2709-10).

Pepin was recalled to the stand on rebuttal to present his side of the charges which Morrell had made against him. Pepin's testimony, and that of several witnesses called in corroboration, clearly demonstrated that Morrell *had deliberately sought to distort the facts as to each incident*:

(1) The poker incident which occurred 3 years before the strike (R. 2710)

Pepin admitted that he and some machinists were turned in by a guard for playing poker (R. 4083-4). It was not, however, during work hours, and he did not over-stay his lunch period as Morrell indicated (R. 4084, l. 22, to R. 5531, l. 22). He testified further that Morrell sent him a warning for playing poker against company rules (R. 4084-5). Two of the machinists charged with Pepin were called and corroborated Pepin's story as to the incident, including his statement that they did not overstay the lunch period (R. 4373-5).

(2) The mail incident which occurred 3 years before the strike (R. 4085)

Pepin admitted he was in the mail room, which was "almost directly across and a few feet down from" his office (R. 4085). He testified that in his work he used the room to sharpen his pencils (R. 4085). On the day in question, a guard came in as Pepin picked up a briefcase lying in a lost and found basket, and turned him in (R. 4085). Pepin denied that he was "looking through different envelopes" as Morrell had stated or that he was looking through envelopes that were "sealed and unsealed" (R. 4086), or that he was going through any mail (R. 4033, ll. 1-2). He stated, without any contradiction in the record, that there was *no mail* in the mail room when he was turned in (R. 4086).

Pepin related further than ten days after the incident, Morrell suspended him; he was given a hearing (R. 4086-7) before a grievance board (R. 4087). Mor-

rell and the guard were present. At that hearing, only the guard gave direct testimony on the incident.¹ (R. 4087). The guard testified only that he saw Pepin pick up the briefcase, look at it, and lay it down (R. 4088). He testified that Pepin did not open it. There was no mention of mail at the hearing (R. 4088). Pepin testified then, that upon motion of a company representative, he was given a two weeks' suspension "for being in the mail room" (R. 4088).

Dick Powell, Machinists' Grand Lodge Representative, testified that he represented Pepin at the hearing on the mail incident (R. 4391). The only eyewitness was the guard who testified that he found Pepin in the mail room examining some type of mail pouch and stated he did not observe Pepin going through any mail (R. 4392-3).

Lawrence Sullivan, who was one of the two union representatives (R. 4396), testified that the guard was the only eyewitness (R. 4397) and that after cross-examination his story was that Pepin had a mail envelope in his hand (R. 4398-9, l. 25) which he described as "a pouch or envelope similar to that brown one there lying on the table" (R. 4401).

(3) Leaving work area early which occurred before the strike (R. 4089)

Pepin testified that he was reported *only once* for leaving his work area early (R. 4089). He left then on company business just before lunch time to find an employee's clock card (R. 4089). He was suspended 25

¹ The guard was not called in the hearing in the instant case.

hours by Morrell for leaving his work area early to eat (R. 4090). After the suspension, Morrell recognized he had been in error and Pepin was paid for his time off (R. 4090) and this even Morrell does not contradict.

(4) The one-tenth deal

Should the one-tenth deal be of any consequence—and we doubt it, Pepin's description of it is to be found at R. 4091. On this incident, Pepin testified that Lodge 751's contract called for overtime payment for the full extra six minutes provided the employees were there at least an extra four minutes (R. 4091). When Morrell, contrary to the terms of the contract, insisted that the timekeepers work a full six minutes before they would be paid any overtime, Pepin, *as shop committeeman*, received complaints and took steps to enforce the contract (R. 5539, to R. 5540). He contacted Assistant Labor Relations Manager Huleen and told him he would have to file a grievance if Morrell did not live up to the contract. Huleen then told Morrell to abide by the contract (R. 4093).

Pepin denied that he made a practice of punching in two minutes late as claimed by Morrell (R. 4093) and testified—and no counter evidence was offered—that his clock cards would show that, in the vast majority of the time, he worked the full extra six minutes (R. 4093). He denied further that Morrell sent out any letter on working the full six minutes (R. 5542, ll. 5-11). He also denied Morrell's testimony that he told Morrell he was only going to work four minutes (R. 4093). Pepin agreed he was taken off overtime, but testified that his immediate supervisor told him it was punishment for forcing these grievances to an issue (R. 4094).

This antedated the strike, subsequent to which Pepin was rehired, thus removing the so-called overtime dispute arising earlier, as a ground for discharge on the eve of the election.

Pepin denied working overtime only at his convenience as Morrell claimed and stated that he was second or third highest in overtime out of 300 timekeepers throughout the war period when overtime was plentiful (R. 4094-5). The General Counsel then asked the respondent to produce Pepin's clock or time cards. Pepin examined his cards "To check on whether (he) worked overtime, and to check whether (he) consistently punched in two minutes late, as testified to by Mr. Morrell" (R. 4378-9), that is "punched in two minutes less than the required six minutes" (R. 4379). He reported that these cards showed as follows *re* overtime (R. 4380-83):

1942—not one day's work without overtime

1943—not one day's work without overtime

1944—worked overtime 300 out of 304 days

1945—worked overtime 200 out of 218 days

1946-1948—worked overtime 53 out of 444 total days

On the one-tenth deal, the cards showed that the system was started on November 7, 1947; and that Pepin was taken off the one-tenth deal after 44 working days (R. 4381). On only five out of the forty-four days did he punch in less than a full six minutes early and receive overtime pay; on twenty-one days he punched in six or more minutes early (R. 4382-4). On the remaining eighteen days he was at work on time but less than four minutes early so that he did not qualify for overtime

under Lodge 751's contract. Morrell, on recall conceded that timekeepers did not have to report in six minutes early if they did not wish (R. 4444).

The above figures from Pepin's time cards clearly support Pepin's testimony and refute Morrell's as to overtime worked by Pepin. In any event Pepin ceased working overtime long before the strike (R. 4381).

The General Counsel asked the respondent to produce any *warnings or memoranda in Pepin's file concerning the various incidents to which Morrell testified*. Counsel for the respondent reported that, after an examination of the file, they found nothing but the arbitrator's decision suspending Pepin "*for two weeks for being in the mail room*" (R. 4377-8). Thus, Morrell's testimony stands wholly unsupported in the record, and, incidentally, the only memo in the file, supports Pepin's testimony as to why he was suspended. It was "for being in the mail room," not for going through mail as intimated by Morrell's testimony (R. 4377-8).

In summary, Morrell was completely discredited as a witness in Pepin's case. Since his testimony had every appearance of being deliberately fabricated, it is submitted that his entire testimony in the hearing as to Pepin should be ignored as completely worthless. "False as to Gerber, false as to Pepin" and definitely proven to be so by the record itself.

The respondent failed to offer any valid reasons why an active union man such as Pepin, who had had no criticisms on his work since the strike, was selected out of seniority for layoff. Reasons were offered which antedated the strike, by some years, and were shown to

be either entirely false or completely distorted. The conclusion is inescapable that the respondent chose Pepin for layoff because of his past performances as an active Lodge 751 committeeman. The choice was made at a time when the respondent knew that Pepin was interested in behalf of Lodge 751, with whom the company had gone through a bitter strike, in an election between it and the Teamsters, whom the company had permitted to engage in a rival organizational campaign.

We submit that on the entire evidence there is a complete absence of any showing that Pepin was discharged for any reason save his participation in concerted union activity. Each of the four reasons assigned by Morrell for his discharge are, by the overwhelming weight of the evidence, established not to have existed in fact. "Distorted" and "discredited" and "improbable" are words best suited to describe "a fair estimate of the worth" of Morrell's testimony.

"Congress has merely made it clear that a reviewing court is not barred from setting aside a board decision when it can not conscientiously find the evidence supporting that decision is substantial when viewed in the light the record in its entirety furnishes, including the body of evidence opposed to the board's view."²

"The board's findings are entitled to respect; but they must nonetheless be set aside when the record before a court of appeals clearly precludes the board's decision from being justified by a fair

² *Universal Camera Corp.*, 1 N.L.R.B., 340 U.S. 474, 95 L.ed. 456.

estimate of the worth of the testimony of witnesses

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The Trial Examiner discredited Morrell in the Gerber case.

Each of the four reasons assigned by Morrell as motivating Pepin's discharge, we submit, when viewed in the light of the record in its entirety, did not exist in fact. The same reason exists to discredit his testimony in Pepin's case. Pepin's discharge was palpably wrongful and he should be restored to his rightful employment status.

2. Peter P. Pioli

The Trial Examiner, in his Intermediate Report and Recommended Order, held that the complaint as to Pioli should be dismissed (R. 19). The Board adopted the findings and conclusions of the Examiner and dismissed Pioli's claim (R. 269 to 288).

The Trial Examiner had before him the witnesses concerning Pioli's claim and Pioli himself. The Examiner had the opportunity of observing the witnesses, their demeanor, apparent honesty and truthfulness, and based on this hearing made certain conclusions of fact. These conclusions as to which witness he believed or disbelieved are nowhere challenged in the record, and we do not challenge them, in fact they are obviously correct. We do challenge, however, his conclusions of law and decision as to Pioli's case. The decision is patently wrong.

The testimony concerning Pioli was given by two

³ *Ibid, supra*, 340 U.S. 474, 95 L.ed. 456.

individuals, Pioli, himself, and Roger Hyman, an assistant superintendent of Boeings. The Examiner, in regard to Pioli's case and discharge, credited Pioli's account and did not believe Hyman (R. 71).

Therefore, let us examine the record in this light. Pioli was employed by Boeing, first, way back in 1938 as a tool and die worker and worked continuously up to the time of his discharge except for two periods, the first in 1945, when the entire plant was shut down, and, second, in 1948, during the strike (R. 69, 499, 500). It is stipulated that he was a "premium" worker (R. 499). No fault was ever found with his work; he was a capable workman (R. 71).

Pioli was one of the most prominent members of Lodge 751 (R. 70). Pioli was a district councilman in 1942, district vice president in 1943, district councilman in 1944, five terms as president of Local Lodge C, and many years as shop committeeman, during the strike in charge of all of Lodge 751's picket lines (R. 501).

The incident which preceded Pioli's discharge is related by Pioli (R. 504, 505, 506). This is the account which the Trial Examiner believes (R. 71) Pioli stated:

"Q. I see. Well, now, how did that incident come about?

A. I was given a die to check to see why the material which had been purchased for the die would not fit properly, and after examination I found that the die was of a 90-degree angle, and the material was an open angle; and the material, naturally, being an open angle, would not go into the slot easily, and I became suspicious that perhaps the ma-

terials that had been used down in Shop No. 102, which is the press department, was faulty, and was the same material; and naturally it would be faulty.

So I consulted my squad leader, Mr. Jim Anderson, or Eiler Anderson, and he referred to my assistant supervisor, Mr. Donald Jensen, and Mr. Jensen wrote out a permit so that I could go down to Shop 102 and check the material.

Upon arriving down there, Mr. Anderson was already there, and he and I checked the material, and found that the material that was being used was of an open angle, and thereby we found what was wrong.

He and I walked back up together. And in the meantime I had sent down a press plate to be sheared, and there was no open press available for the shearing process, so that I asked the press man to notify me when there was a press available, and I had no sooner gotten back up there at 702 when Mr. back up there to 702 with Mr. Anderson, when I was called on the phone and informed that there was a press open in Shop 102.

Mr. Jensen informed me to use the same pass and to go down and to put my press plate on the press; and I went down, and Mr. Harry Hutton helped me put the press plate on the press. And about that time the whistle blew for lunch hour, and he and I came back up together to Shop 702.

Q. Now, Mr. Hutton, who is he?

A. He is the try-out man.

Q. I see.

A. The die try-out man.

Q. All right, then; you came back to 102?

A. Yes, sir.

Q. I see.

A. I came back to 702 rather.

Mr. Anderson, I went over to my bench, and Mr. Anderson informed me that Mr. Hyman was having quite a steam pressure, and that he was accusing me of having gone down into 102 for the purpose of organizing.

Mr. Hyman about that time came into the shop office, and I walked up to him and I showed him my pass, and I informed him that I was down there on legitimate business, and that Mr. (358) Anderson was down there with me, and he was very arbitrary.

Q. What did he say?

A. You want to know what he said?

Q. Yes.

A. He said, 'God damn you, Pioli, you know god damned well you were down there in 102 organizing,' and I said, 'Hyman, you are a damned liar,' and 'that is something you are going to have to prove.'

He said, 'I don't have to prove anything.' He said, 'Right now they will take my word for it, and you are as good as out.'

Q. Did that end the conversation with Hyman, then?

A. I walked away from him, because after all, when certain things occur I am not a very peaceful man myself. I walked away from him, and I went over and attempted to eat lunch. It choked me so I quit eating lunch and Mr. Delaney came in, and I spoke to Mr. Delaney. And Mr. Delaney—(359)."

Hyman gives his account of the incident as follows:

“A. Yes, Jim Anderson is a squad leader; and then he came back to the office, storming up there, and asked me what right or reason did I have to be checking up on him. He said, ‘I had the right to be there.’ I told him that I did, too, and that I was merely in performance of my duty, and then he said, ‘I had the right to be down in 102, and what right did you have to be checking up on me?’ And I said I had the right to check up on anybody in the shop as long as Mr. Delaney had asked me to take it over. And I said, ‘Further, for your information, I just came to the shop and was here about ten minutes when I got a telephone call that you were down with a group of people in 102, waving your arms, trying to organize apparently.’ And he said, ‘You are a god damn liar.’

Q. What did you do then?

A. I said, ‘Pete, would you mind repeating that,’ because I wanted to be sure that the statement he made was that I was a ‘god damn liar.’ And at that time I told him, ‘Well, Pete, so far as I am concerned, you are through working for the Boeing Airplane Company.’

Q. What action did the board take?

A. Upon my recommendation, they terminated him.” (R. 3359, 3360, 3361)

The Trial Examiner does not believe Hyman’s version (R. 71). The Examiner found that Hyman was prone to use vulgar and profane language when angry (R. 71).

Based on the record, there is only one reason why Pioli was discharged by Hyman, such discharge being

concurred in by Boeing, and that is found in Pioli's statement "He (Hyman) said, 'God damn you, Pioli, you know god damned well you were down there in 102 organizing' and I said, 'Hyman, you are a damned liar,' and 'that is something you are going to have to prove.' He said, 'I don't have to prove anything.' He said, 'Right now they will take my word for it, and you are as good as out' " (R. 506). The above is the version the Trial Examiner believed.

Here we have a situation in which one of the most prominent and well known union officials is discharged because he is falsely accused of organizing on the job. The swearing incident is patently not the reason, for Hyman, himself, states

" * * * And so far as that shop or any shop is concerned, I believe that swearing is usual, but not particularly unusual." (R. 3362)

Pioli had high seniority on his job, being employed first in 1938. The reason given for his discharge is merely a guise. Hyman had this prominent union official, with high seniority and record of capable workmanship, discharged because of alleged unfounded concerted activity. Pioli was clearly discriminated against because of his union connections.

The Trial Examiner made a finding of fact as to what account of the incident was true in these words: "I credit Pioli's version of the incident" (R. 71).

As held by the Supreme Court in *Universal Camera Corporation v. National L. R. Bd.*, 340 U.S. 474, 95 L.ed. 456, 472:

"The findings of the examiner are to be considered along with the consistency and inherent prob-

ability of testimony. The significance of his report, of course, depends on the importance of credibility in the particular case.”

In this case, the Trial Examiner credited Pioli's version of the facts. It is too clear for argument that the reason assigned for discharge of an employee of 12 years' standing has no foundation in the evidence in this case. It can only be naturally explained under the evidence as being grounded upon his active union connections and activity.

CONCLUSION

On the record before this court a "fair estimate of the testimony" regarding Pepin and Pioli, clearly demonstrates that the proximate cause of Pepin's lay-off and Pioli's discharge was not for the reasons assigned by management. These reasons, aside from their bearing the badge of remoteness in time, and improbability in reason, were clearly demonstrated by the evidence to be without foundation in fact. A conscientious appraisal of the evidence can but lead to one conclusion: The proximate cause and motive behind the company's action in both cases was to weed from its ranks these two union employees, who exercised their right of engaging in concerted union activity—a right guaranteed them by the Taft-Hartley Act. Both should be reinstated to their positions at which they worked successfully and without complaint for nearly a decade.

Respectfully submitted,

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No. 13802

In the United States Court of Appeals
for the Ninth Circuit

BOEING AIRPLANE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION FOR REVIEW AND REQUEST FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 13802

BOEING AIRPLANE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

*ON PETITION FOR REVIEW AND REQUEST FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

JURISDICTION

This case is before the Court upon the petition of Boeing Airplane Company to review and set aside an order of the National Labor Relations Board (R. 285-290)¹ issued against petitioner on March 26, 1953, following the usual proceedings under Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Sec. 151, et seq.), herein called the Act. In its answer (R. 4459) the Board has requested enforcement of its order. 'This Court has jurisdiction of the proceeding pursuant to Section 10 (e) and (f) of the Act, the unfair labor

¹ References to portions of the printed record are designated "R." Exhibits not reproduced in the printed record are designated "G. C." or "Res." followed by their original number. Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

practices having occurred in Seattle, Washington, within this judicial circuit.² The Board's decision and order are reported in 103 N. L. R. B. No. 115.

COUNTERSTATEMENT OF THE CASE

I. The Board's findings of fact and conclusions

The unfair labor practices involved in this proceeding began in the latter part of 1948 following the voluntary cessation of a strike by the IAM.³ During the course of the strike, which was caused by an impasse in collective bargaining, a new Teamsters local⁴ was formed and with the encouragement and cooperation of the Company,⁵ it carried on an intensive organizational drive among the nonstriking employees. After the end of the strike the IAM, which lost its status as exclusive bargaining representative as a result of the strike,⁶ joined in the campaign and for several months the two unions competed vigorously to secure the status of bargaining representative of Boe-

² Petitioner, Boeing Airplane Company, is a Delaware corporation having its principal office in Seattle, Washington, where it is engaged in the manufacture of aircraft and aircraft parts, in the course of which it makes substantial purchases and sales in interstate commerce. No jurisdictional issue is presented.

³ Aeronautical Industrial District Lodge No. 751, International Association of Machinists, referred to in this brief as "IAM".

⁴ Local No. 451, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL, referred to in this brief as "Teamsters."

⁵ Boeing Airplane Company, petitioner, referred to in this brief as "Company," or by name.

⁶ In *Boeing Airplane Company v. N. L. R. B.*, 174 F. 2d 988 (C. A. D. C.), setting aside 80 N. L. R. B. 447, the Court of Appeals for the District of Columbia Circuit held that the strike was unlawful because the IAM did not give the Company the 60 day notice required by Section 8 (d) of the Act and because the strike

ing's employees. It was during this campaign that the Company, which admittedly hoped for the displacement of the IAM by the new Teamsters local, committed its numerous unfair labor practices. Briefly these involved: (1) Giving illegal support and assistance to the Teamsters; (2) interfering with the protected union activities of employees who were members of the IAM; (3) discriminating against employees who were members of the IAM either because of their support of that union, or their expressed opposition to the Teamsters; and (4) discriminating against an employee because she filed a charge with the Board.

The evidence with respect to the Company's unfair labor practices is summarized below:

A. The Company assists and supports the Teamsters in its attempt to displace the IAM as bargaining agent of its employees

Introduction

The IAM had been the collective bargaining agent of the Company's employees since 1938 (R. 68; 2271). Following World War II, the Company was compelled to curtail employment substantially and difficulties

breached the no-strike clause of the agreement. Section 8 (d) provides that "any employee who engages in a strike within the sixty-day period specified * * * shall lose his status as an employee of the employer in the particular labor dispute, for the purposes of Section 8, 9 and 10 of the Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer." Accordingly, the Court concluded, the IAM "forfeited all right to be considered as a collective bargaining agent for the employees of the Company." 174 F. 2d at 991. For other legal aspects of this strike, see *Boeing Airplane Co. v. Aeronautical Industrial Lodge*, 91 F. Supp. 596 (W. D. Wash.), affirmed, 188 F. 2d 356 (C. A. 9), certiorari denied, 342 U. S. 821.

developed between it and the IAM with respect to seniority and wage problems (R. 68; 2323). In 1948, during negotiations for a new agreement, an impasse was reached on these issues and on April 22, a strike was called by the Union (R. 68; 2320, 383). The strike continued until September 13, 1948, at which time an unconditional offer was made to return to work and employees began to apply for reemployment (R. 69; 383).

Soon after the strike began, the Teamsters formed a new local for aeronautical workers and for the first time attempted to organize Boeing employees (R. 188; 2074-2075). Petitions were circulated among the non-strikers and within a short period several thousand signatures were obtained (R. 188; 2087-2089). The Company permitted professional organizers for the Teamsters to enter the plant and an active campaign was carried on throughout the strike (R. 188-189; 2028-2030, 2086-2088, 2307).

Company officials admitted at the hearing that they welcomed the appearance of the Teamsters on the scene. A letter from President Allen to company officials declared that the Company "did welcome the entry of the A. F. of L. union [Teamsters] into the picture because we hoped that it would give us an opportunity to build a sound employee-management relationship." (R. 187-188; Res. Ex. 43.) Later in the same communication, he stated "At present the attitude of the leadership of 751 [the IAM] makes it appear that we could come much closer to meeting on common ground with the leadership of 451 [the Teamsters] than with that of 751" (*ibid.*). Explaining

Allen's attitude, Vice President Logan testified that the Company's difficulties with IAM prior to the strike had led him to the conclusion that it would be impossible to develop good relations with that union and that he had "some general idea that another outside organization might exercise some restraining influence on * * * the attitude in the relationship between 751 and the Company" (R. 187-188; 2346-2347).

The actions of the Company detailed in the succeeding sections (*infra*, pp. 5-12), in attempting to make the hoped for replacement of the IAM by the Teamsters a reality, form the basis for the Board's finding that the Company gave illegal assistance and support to the Teamsters in violation of Section 8 (a) (2) and (1) of the Act.

1. *The Company gives preference for employment to applicants referred by the Teamsters*

At the time the Company gave permission to Teamsters' organizers to solicit in the plant, it also entered into an arrangement with that union under which the Teamsters were to refer applicants for employment to Boeing (R. 189; 352). The Teamsters thereupon established a hiring hall and with the knowledge of the Company advertised in the Seattle newspapers that it was in a position to place applicants at Boeing (R. 189; 355, 2091-2093). Numerous employees thereafter made applications for jobs at Boeing through the Teamsters (R. 189; 355) and, as is discussed below, were hired immediately by the Company on a preferential basis.

Thus several applicants hired after they received Teamsters referrals had initially applied directly to the Boeing personnel office without success (R. 189-191, 193; 2032-2034, 2045-2047, 2118-2120). Ruby Heston's experience was typical. She testified that during the month of October, 1948 she applied for employment through the Boeing personnel office on four separate occasions but was told that no women were being hired by the Company (R. 193; 2032). Hearing that applicants referred by the Teamsters were being hired, she decided to join that Union, and on October 28, she went down to the Teamsters' hiring hall, joined, and received a referral slip (R. 193; 2033-2034). She returned to the Boeing personnel office with the referral slip that same day and this time was quickly processed and told to report to work on November 1 (R. 193; 2034).

William Klein testified that when he applied directly to the Boeing personnel office in January 1949, it was indicated to him that there was nothing immediately available (R. 189-190; 2046). He too, however, learned that applicants referred by the Teamsters were being placed immediately, so the next day he went to the Teamsters' hiring hall (R. 190; 2046-2047). When he got there he "asked for a job" and, in his words, "they started signing me up" (R. 190; 2047). He received a referral slip, returned with it to the Boeing personnel office and this time, as was Heston's experience, he was quickly processed and told to report to work within a few days (R. 190; 2047).

In addition to Klein and Heston, similar evidence was presented with respect to Clair Boitnott (R. 191; 2118-2120), Charles Courtier (R. 190; 2110-2112) and Anthony Brody (R. 190; 2110-2112). In all cases the employees after being refused employment when they applied directly at Boeing's personnel office, were processed with great dispatch and hired when they joined the Teamsters and received referral slips (R. 189-191, 193; 2118-2120, 2110-2112). The Board found, in agreement with its trial examiner, that during this period individuals referred by the Teamsters were preferred for employment over applicants without such reference (R. 219).

2. The Company checks off union dues for the Teamsters and makes dues deduction authorizations irrevocable

Applicants who applied to the Teamsters for employment at Boeing, in addition to joining that Union, also agreed to a check off of monthly union dues (R. 193; 1001-1002, 2038, 2096, 2930, G. C. Exh. 86). Although the Teamsters were at no time recognized or certified as the employees' bargaining agent, the Company honored these check offs and each month paid over to the Teamsters the union dues deducted from its employee's wages (R. 193; 2929-2930).

Boeing at all times has had a company rule permitting employees to cancel any authorized payroll deduction at any time simply by giving the Company written notice (R. 194; 219; Res. Exh. 44, p. 10, G. C. Exh. 178). The Company's timekeepers were supplied with forms addressed to the payroll department which

employees could use to effect such cancellations (R. 277, 80; 862, G. C. Exh. 68). In its agreements with the IAM, when that Union was the bargaining agent for employees, it was provided that deductions would be discontinued whenever the Company received a signed stop notice from the employee involved (R. 277; G. C. Exh. 178, p. 9, Res. Exh. 58, p. 27).

After the strike and the return of the IAM member-employees to work, an article appeared in the November 18, 1948, issue of "Aero Mechanic," the IAM's official newspaper, advising employees that Company forms were available at the timekeepers desks for cancelling dues deduction authorizations (R. 79-80; G. C. Exh. 69). The article, which was written by Arthur C. Gerber, one of the Company's timekeepers, urged members of the IAM to encourage members of the Teamsters to cancel their Teamsters authorizations, and thereby to "get out of the Teamsters." (*Ibid.*)

The article was a success and within several weeks a notable increase in Teamsters' cancellations resulted (R. 80; 866-867). On at least one occasion Gerber, who handled a substantial number of such cancellations himself, ran out of cancellation forms and had to wait a day or two before the Company furnished him a new supply (R. 80; 867). Later, at the height of the poststrike organizational campaign between the IAM and the Teamsters, Gerber prepared a special form which the IAM had mimeographed and promoted, and which employees also could use to cancel their Teamsters' dues deductions (R. 869, G. C. Exh. 7).

Shortly thereafter, on December 7, 1948, Gerber was discharged by the Company because of his efforts to induce members of the Teamsters to cancel their dues deduction authorizations,⁷ and authority to process payroll deductions was transferred from the timekeepers to the personnel department (R. 277; 1026). In addition, the Teamsters, which earlier had used revocable dues deduction forms for all members, began early in 1949 to require "irrevocable" forms from individuals whom it referred to Boeing for employment (R. 277; 2930). It was during this period that William Klein, knowing of the Company's rule permitting payroll deductions to be cancelled at any time, went to the personnel department, signed a slip cancelling his Teamsters' dues deduction authorization, and requested that his dues deductions be stopped (R. 193-194; 2048). He was told, however, in the face of the company's rule, that he could not revoke his authorization and despite his protests, dues continued to be deducted from him (R. 194; 2048-2049).

Pointing out that there was no contract between the Teamsters and the Company, and that the Company's own employment rules provided that such deductions as union dues could be cancelled at any time, the Board found, in agreement with its trial examiner, that the refusal to permit Klein to revoke his check off authorization was additional evidence of the Company's unlawful support of the Teamsters (R. 219).

⁷ The Board's finding that Gerber's discharge was discriminatory is discussed *infra*, pp. 25-29, 56-63.

3. *An employee is denied promotion to a supervisory job because of opposition from the Teamsters*

Several months after the strike, in December 1948, the chief timekeeper, Morrell, asked a relief timekeeper, Carrig, who was a member of the IAM and a participant in its strike, if he would consider promotion to a supervisor position (R. 191; 2194-2195). Carrig was reluctant at first since appointment to a supervisory job would mean a loss in overtime pay, but he accepted when Morrell told him that the position would be permanent and that Carrig was the one man Morrell had in mind for promotion (R. 191; 2195-2196). It was then agreed that Carrig would continue his current assignment at Moses Lake, several hundred miles from Seattle, and return on January 15, 1949 as a supervisor in the time department (R. 191-192; 2196).

About the 10th of January, Morrell wrote Carrig, who was still at Moses Lake, to disregard his prior instructions and to hold his move in abeyance (R. 192; 2196). On January 25, Morrell came to Moses Lake and told Carrig that his promotion had been stopped by Vice President Logan because of opposition from the Teamsters (R. 192; 2196). Morrell promised to make a further attempt to effect the promotion by sending it up through different channels so that Logan would not have an opportunity to veto it (R. 192; 2197).

Several weeks later, on February 12, 1948, just prior to Carrig's scheduled return to Seattle from Moses Lake, he received another phone call from Morrell's secretary telling him not to leave until Mor-

rell personally contacted him (R. 192; 2197). Morrell met Carrig shortly thereafter and informed him that his promotion to a supervisor had again been stopped by Logan (R. 192; 2197-2198). On this attempt Logan's decision had been appealed to the treasurer of the Company, Bowman, and finally to the president of the Company, Allen (R. 192; 2198). Allen, however, sided with Logan, and as a result the promotion was never put through (R. 192; 2198). Morrell related that Bowman, Boeing's treasurer, had remarked when the case came before him that it appeared that Logan "was in bed with the Teamsters" and there was nothing to be done about it (R. 193; 2199).

The Board found, in agreement with its trial examiner, that the Company assisted the Teamsters by permitting it to veto a promotion (R. 219).

4. *Employees are warned that membership in the Teamsters would put them in a better position to keep their jobs in an impending layoff*

Assistant Foreman Smith told employees Scott and Crozier that members of the Teamsters would have a better chance than others of retaining their jobs in an impending layoff (R. 273, 220-221; 2136-2140). As explained by employee Scott (R. 2137):

He [foreman Smith] would tell us about the layoffs that were coming; we knew that they were laying people off, but various times he mentioned members of 451 [Teamsters] would have a better chance than some of the rest of us for keeping our jobs.

that "we have no union and nothing is recognized" (R. 189, 272; 920, 360, 2054). At least one employee, Claude Myrick, was warned that refusal to remove his button "could mean [his] dismissal" and he and most of the others complied (R. 181; 1287).

Stanley Burrell, a woodworker of many years' experience with the Company, however, refused to remove his steward button when told to do so (R. 94; 2054). He had participated in the strike, and on the day of his return to work, he wore a small button stating that he was an IAM committeeman (R. 94; 2053). His foreman, Hassack, came up to him and ordered him to remove his button with the standard explanation: "I don't recognize it." (R. 94; 2054). When Burrell refused, Hossack left but returned in about twenty minutes, again demanded that Burrell remove the button, and when Burrell again refused suspended him indefinitely (R. 94; 2054).

3. *The Company prohibits employees from wearing "I am loyal to 751" streamers and suspends Doris Cinotto for refusing to remove one*

It is undisputed that following the strike, the Company refused to permit employees returning to work to wear small four inch ribbons which stated "I am loyal to 751"⁹ (R. 189, 270-271; 361, 933, 1317, 2063). As in the case of the steward buttons, most employees complied with the demand (*ibid.*).

Doris Cinotto was one of the employees instructed on the day she returned to work after the strike to remove her "I am loyal to 751" ribbon (R. 180-181; 2063). On that occasion she removed it as instructed

⁹ "751" was the Lodge number of the IAM local.

(R. 180; 2063). Several days later, however, on September 15, 1948, she again wore the ribbon and this time refused to take it off, with the result that she was suspended for three days (R. 180; 2063-2064).

Conclusions

The Board concluded that the rules applied by some supervisors which prohibited union activity on nonworking time, the rule prohibiting employees from wearing steward and committeeman buttons, and the rule prohibiting employees from wearing "I am loyal to 751" streamers, unreasonably interfered with the concerted activities of the employees and thereby violated Section 8 (a) (1) of the Act (R. 270-272). Reversing its trial examiner (R. 206, 220), the Board found no special plant circumstances reasonably warranting the adoption of these rules from the viewpoint of maintaining production or discipline (R. 270-272). In agreement with its examiner (R. 206-207), the Board found that Burrell's discharge for wearing an IAM committeeman button was invalid (R. 270 and n. 3), and in disagreement with its examiner (R. 220), held that Cinotto's suspension for wearing an IAM ribbon was invalid (R. 272).

C. Employees are discriminated against because of their IAM membership and activities or because of their opposition to the Teamsters

During the course of the organizational campaign and at the height of the rivalry between the IAM and the Teamsters, the Company, through several of its supervisors, utilized numerous opportunities to show its disfavor of the IAM by discriminating against its members in the matter of discharge, discipline,

layoffs, and recalls. The cases of such discrimination found by the Board are considered individually below.

1. *Don J. Parezanin*

Parezanin was employed by the Company in 1947 (R. 78; 713). He became a member of the IAM, serving for a period as a shop committeeman, and participated in the 1948 strike (R. 78; 714). After the strike terminated, he was reemployed (R. 78; 715).

On November 2, 1948, several weeks after the strike, Parezanin was suspended because of his supervisor's belief that he had left his shop without permission to talk to a fellow employee (R. 78; 726-727, 721-722). A few days later he was given a hearing on his suspension before Superintendent Molitor and other supervisors (R. 78; 719). At this hearing Molitor questioned Parezanin about his participation in the strike implying that Parezanin's failure to work during the strike was an act of disloyalty to the Company (R. 78; 720-721). When Parezanin explained that he did not want to go through the picket line because he was a member of IAM, Molitor retorted that the strike was unlawful (R. 78; 721). Molitor then asked what assurance Parezanin would give that he would be loyal to the Company in the future (R. 78; 722). When Parezanin said "My word," Molitor retorted that that would not be sufficient (*ibid.*), and a few days later Parezanin was terminated (R. 78; 722, G. C. Exh. 58).

Molitor denied questioning Parezanin on this subject and contended that Parezanin's discharge re-

sulted solely from his absence from his shop without permission (R. 78-78; 3286). The Board, affirming the trial examiner, discredited Molitor's denial and on the basis of the credited testimony found that although Parezanin may have been absent from his shop without permission and his suspension on November 2 given for a nondiscriminatory reason, his discharge after the hearing was occasioned solely by the Company's resentment against his participation in the IAM strike (R. 203). Accordingly, it concluded that Parezanin's discharge after the hearing violated Section 8 (a) (3) and (1) of the Act (R. 203).

2. Jack Haworth

Haworth was first employed by the Company in 1942, and was working prior to the 1948 strike (R. 97; 1169-1170). He was a member of the IAM and participated in the strike (R. 97; 1170). When the strike ended, he returned to his former position (R. 97; 1170).

Several months later he had a disagreement with Assistant Foreman Charles Pickett (R. 97; 1171-1174). Pickett complained that he had difficulty in getting Haworth to follow directions and reported several incidents to General Foreman Mergorden (R. 98; 3292). He recommended to Mergorden that Haworth be suspended for 3 days (R. 98; 3302).

Megorden, following Pickett's report, had Haworth brought to his office and asked him if he ever had used profane language toward Pickett (R. 98; 3170). Haworth said that he had not and that he was willing to cooperate (R. 98; 3170). Megorden nevertheless

ordered him indefinitely suspended and he was subsequently discharged (R. 98; 3178).

Megorden, when questioned about why he changed Pickett's recommendation that Haworth be suspended for 3 days to a discharge, testified that he received reports that Haworth "was at that time very closely connected with the Union activities going on at the plant there" (R. 98, 208; 3173). Elaborating during cross-examination, Megorden explained that the report of Haworth's union activities had come to him from Pickett who knew those of the employees who were the "ringleaders" in the IAM (R. 3181-3182). The Board found, affirming the trial examiner, that Megorden changed Haworth's recommended suspension to a discharge because of Haworth's participation in union activities on behalf of the IAM, and that the Company thereby violated Section 8 (a) (3) and (1) of the Act (R. 208).

3. *Madeline Haddix*

Haddix was first employed in 1942 as a rivet buckler but at the time of the strike worked on the wash rack (R. 122; 881). She was a member of the IAM and for a period was shop stewardess (R. 122; 882). She participated in the IAM strike, and when it was over returned to her job on the wash rack (R. 122; 882).

On the day she reported for work she was told by the foreman of her shop, George James, that "from now on there will be no discussion of the union either in or out of the plant while at work." (R. 122; 882-883). Several days later, Haddix fell into disfavor with a woman under whose leadership she worked,

with the result that in about a week she was transferred to another wash rack in the shop (R. 122; 883). She worked at the new location until October 21, 1949, received no complaints, and, in fact, was complimented on her performance (R. 123-124; 884).

After she was transferred to the new wash rack, Assistant Foreman Welling, who was in charge of the operation, remarked to Haddix that "there are some people going to be laid off; we will have to lay off some, and I wonder who will be next?" (R. 123; 884). He then turned to Haddix and said "the trouble with you is that you belong to the wrong union." (*Ibid.*) A few weeks after this conversation, on October 21, Haddix was laid off (R. 123; 885).

The layoff slip was given to Haddix by another foreman, Lynn, who told her at the time that the lay-off was temporary and that she would be called back (R. 123; 885). Despite this assurance, however, Haddix never has been able to secure reemployment (R. 123; 889). In September 1950 she spoke to Foreman James about her difficulty and asked him if there was anything wrong with her work (R. 123; 889). James replied that there was not (R. 123; 889). Nevertheless she was told in June 1951 by the personnel office that it would be best if she sought work elsewhere (R. 123; 889). Later another foreman, Smith, submitted a requisition to the employment office specifying that Haddix be sent to his department for work, but even this was ineffective (R. 123; 891).

At the hearing Foreman James and Welling both testified that Haddix's work was satisfactory except that she had some difficulty in getting along with her

fellows (R. 123; 2684, 2680). These officials also testified that Haddix's layoff was occasioned by cancellation of a B-54 contract (R. 123; 2682). However, the Company's records show that the contract was cancelled in April 1949 and resulted in layoffs in April and May, while Haddix was not laid off until October 21, 1949 (R. 123, 277; Res. Ex. L. 38, p. 2). The personnel manager, Selden, confirmed from the Company's records that Haddix was a good worker but stated that a history of three resignations after short periods of employment militated against consideration for rehire (R. 124; 3864). At the same time Selden admitted that the Company had no definite policy in connection with individuals who quit after working for short periods of time (R. 124; 3864).

The trial examiner credited the testimony of Haddix that shortly before her layoff Foreman Welling told her that some workers would be laid off and that she belonged to the wrong union (R. 216). The trial examiner also found that the testimony of personnel manager Seldin concerning the reasons for not rehiring Haddix was pure speculation and that no credible explanation of her rejection had been offered (R. 216). Nevertheless the trial examiner concluded that there was an insufficient showing that Haddix's layoff was discriminatory (R. 216). Reversing this conclusion, the Board found that the statement to Haddix that she belonged to the wrong union in connection with an impending layoff was "an accurate prediction of things to come," pointing out also that the reason assigned for her layoff—cancellation of the B-54 contract—could not be accurate; moreover,

one of the foremen assigning this reason was on vacation at the time of the layoff (R. 277-278).

4. *Dorothy Schott*

Dorothy Schott was first employed in June 1942 and at the time of the strike was a spot welder (R. 176; 1994-1995). She was a member of the IAM and remained out during the period of the strike (R. 176-177; 1995). In October 1948, after the strike, she was reinstated to her job as a spot welder (R. 176-177; 1995).

About 2 or 3 months later, Schott was removed from her spot welders job and assigned to the wash rack, a job usually reserved for beginners (R. 177; 1996). On the day of her demotion, her one-time foreman, Lawrence, noticed her on the wash rack and remarked "What are you doing here, they sure have been downgrading you" (R. 177; 1999-2000). He then grabbed hold of an IAM membership button she was wearing and exclaimed: "Well, Holy God, you have got the wrong button" (R. 177, 220; 2000). He left before Schott had a chance to comment (R. 2000).

Foreman James testified for the Company that Schott was downgraded because there was a surplus of welders in the classification she then held and it was a question of accepting a downgrade or taking a layoff (R. 2000). No explanation was offered, however, as to why Schott was chosen for the wash rack over other spot welders (R. 177, 279-280; 2699-2701).

In view of the foreman's statement, in commenting on Schott's demotion, that she belonged to the wrong

union, and in the absence of any adequate explanation concerning the reason for her selection for downgrading, the Board found, reversing the trial examiner (R. 215, 220-221), that she was demoted because of her membership in the IAM (R. 279-280).

5. *Claude C. Myrick*

Claude Myrick was first employed by the Company in January 1940 (R. 180; 1283). He later left to serve in the United States Marine Corps, but had returned to work by the time of the 1948 strike (R. 180; 1284). His job was as a sheet metal worker (R. 180; 1284).

Myrick was one of the leaders in the IAM, holding the position of committeeman (R. 180; 1284-1285). When the strike was called in 1948, he walked out and engaged in picket duty (R. 180; 1285). Following termination of the strike, he returned to his job (R. 180; 1285).

After his return, Myrick was one of those instructed to remove their IAM committeeman's buttons, being told that failure to do so might result in his discharge (R. 181; 1286-1287). He complied with the demand (R. 1287). Later he was overheard discussing the union problem with an employee named Ray Smith, and was warned by supervisors Watling and Keene that such conduct also could result in his termination (R. 181; 1287-1288).

Still later, about 2 weeks before he was discharged, supervisor Keene engaged Myrick in conversation (R. 181; 1288-1289). Keene stated that it looked as though the IAM would win the impending repre-

sentation election and that Myrick would again be a shop steward (R. 181; 1289). Keene then inquired as to what Myrick's attitude would be, to which Myrick replied that he would make the Company live up to its contract (R. 181; 1289). During this same period, supervisor Watling also engaged Myrick in a conversation about his union activity, this supervisor telling him that he, Myrick, "could be something around here if" he "would forget about the unionism angle" (R. 278; 1290). Shortly before his layoff, Foreman Burnham, who was employed in another shop but who maintained a friendly relationship with Myrick, warned that his layoff was contemplated and said he felt it was motivated by Myrick's union activity (R. 181-182; 1307).

On October 21, 1949, Myrick was laid off, and since has been unable to obtain reemployment (R. 181; G. C. Exh. 116). Foreman Keene testified that he considered Myrick to be the least desirable worker in the shop, and that when it became necessary for economic reasons to reduce the number of employees in the shop, he arranged for Myrick's layoff (R. 182; 3026). Supervisor Watling testified that he was dissatisfied with Myrick's work because Myrick was unnecessarily painstaking and resented any criticism or suggestions in connection with his work (R. 182; 2987-2988). On one occasion, Watling stated, he complained to General Foreman Fite that Myrick refused to respect his orders with the result that Myrick was placed on probation for 30 to 60 days (R. 181; 2990-2991). Myrick was taken off probation several months prior to his layoff, however, and at the hearing

Watling and Keene testified that they considered Myrick's skill good (R. 182; 3023, 2987-2988). This estimate of Myrick's work was confirmed by Superintendent Fairbanks (R. 279; 1292-1293).

At the time of his layoff Myrick had more seniority than anyone in the shop with the exception of one employee (R. 1293). He was unable to secure any explanation for his selection from either Watling or Keene (R. 278; 1292). Superintendent Fairbanks, although vague, did tell Myrick that he had discussed his layoff with a higher official, but the matter was out of his hands; and that he had a job to keep (R. 279; 1293).

The Board found, reversing the trial examiner (R. 218), that Myrick was selected for layoff because of his position of leadership in the IAM (R. 279).

6. *Clyde N. McDonald*

McDonald was first employed in March 1948. He was a member of the IAM and participated in the 1948 strike. Soon after the strike ended, he returned to his former position. (R. 183; 963.)

Following his return to work he was frequently solicited to join the Teamsters by Al Korth, a professional Teamsters organizer (R. 183; 964). On August 5, 1949, while Korth again was attempting to induce McDonald to change his allegiance, McDonald said that if he ever joined an A. F. of L.¹⁰ union, it would be the International Brotherhood of Electrical Workers, not the Teamsters, since he was an electrical worker (R. 183; 965). After McDonald made this

¹⁰ The Teamsters is affiliated with the A. F. of L.

statement, Korth examined McDonald's Company badge which showed his name and department number, and walked over to shop foreman Dietz, who was standing close by (R. 183; 965). Korth engaged Dietz in conversation, and both men kept glancing over at McDonald (R. 183; 965). Within an hour Dietz handed McDonald a layoff slip, saying "get your stuff together, and clear out" (R. 183-184; 965-966).

Dietz offered McDonald no explanation for his lay-off (R. 184, 279; 966). Randall, a general foreman of the department in which McDonald was employed, testified, although he had no personal recollection of McDonald as an individual, that McDonald was laid off because of a general reduction in force, McDonald being a recent employee and other employees being more capable (R. 183; 2543-2544). The Company did not offer to call any of McDonald's immediate supervisors to testify concerning McDonald's qualifications.

Considering the precipitous manner in which McDonald was laid off, without warning or explanation, immediately after a discussion between the foreman and the Teamsters organizer following the failure of the organizer to induce McDonald to abandon his IAM allegiance, the Board found, reversing the trial examiner (R. 215), that McDonald was laid off because of his opposition to the Teamsters and preference for the IAM (R. 279).

7. Arthur C. Gerber

Gerber was first employed by the Company in 1942 as a timekeeper (R. 79; 852). He joined the IAM and in 1948 participated in the strike (R. 79; 852).

When the strike ended, he returned to work and was reassigned to his regular position (R. 79; 853).

As was mentioned above, *supra*, p. 8, Gerber wrote an article for the November 8, 1948, issue of the IAM newspaper urging members of the Teamsters Union to cancel dues deduction authorizations to that organization explaining how they could do so, and recommending that IAM members assist them to that end (R. 79-80; G. C. Exh. 69). The article was effective and following its publication, the number of cancellation forms processed by Gerber as a company timekeeper markedly increased (R. 80; 861, 876, 866-867).

After the article appeared, Gerber noticed a change in the attitude of the foremen in the shop to which he was assigned (R. 80; 867-868). A superintendent, Kravic, for example, who formerly was friendly, ceased being so, and a week after publication of the article asked Gerber if he had a copy of the cancellation blank (R. 867-868). It was shortly thereafter that the Company transferred the function of processing the deduction blanks from the timekeepers to the personnel department (R. 277; 1026).

On December 7, 1948, without prior warning Gerber was handed a termination notice by his assistant foreman, John Marx, the notice stating that Gerber was discharged for "making threats to fellow employees" (R. 80; 853, G. C. Exh. 66). Marx stated that he had nothing to do with the termination, the slip having been given to him in an envelope with instructions to sign it (R. 80; 853). Others who signed the slip were Isaacson, personnel manager, and Mor-

rell, the chief timekeeper and department head (G. C. Exh. 66). There were no signatures in the spaces provided for foreman and division head, although the form stated that the signature of the division head was "required in cases of dismissal" (G. C. Exh. 66).

Morrell testified that he arranged for Gerber's discharge 2 or 3 days after he obtained written statements from employees claiming that they had been threatened by Gerber with loss of their jobs if they did not join the IAM (R. 81, 274; 2713-2714, 2717). This testimony was contradicted, however, by the Company's records and by the testimony of Fred Huleen, the Company's Assistant Labor Relations Manager, which established that no written statements were secured from employees until 8 or 9 days *after* Gerber's discharge and, furthermore, that Morrell *played no part* in securing such statements (R. 274; 2723-2724, 2726). Gerber also contradicted Morrell's testimony, testifying in his own behalf that he was told by Morrell that he, Morrell, placed no faith in any accusations that Gerber had threatened employees (R. 80, 275; 855). It was not denied by Morrell that he refused to identify to Gerber any of the employees allegedly threatened by him (R. 855).

At Gerber's request, a hearing on his discharge was held before a supervisory review board on December 13, 1948 (R. 80-81, 275; 856-857). This Board professed complete ignorance of his case or the reasons for his discharge (R. 858). Gerber informed the panel that he had processed numerous dues deduction cancellations, but denied in a formal affidavit that he ever made threats to his fellow employees (R. 80-

81; 859, G. C. Exh. 67). Morrell was called as a witness before this review board (R. 274; 2723-2724), but did not appear before it together with Gerber (*ibid.*), contrary to the implication of Morrell's testimony (R. 274; 2714-2715), credibly contradicted by Gerber (R. 274; 4138-4139).

About one week after the board hearing, Gerber was notified through Morrell that the board had upheld the discharge (R. 81, 275; 859-860). Gerber appealed to Fred Huleen, assistant labor relations manager, suggesting that his activity in promoting the cancellation of Teamsters' dues deductions might explain the discharge (R. 81, 275; 860). According to Gerber, Huleen, referring to a little black book in his inside pocket, charged Gerber with putting through 10 Teamster cancellations (R. 81; 860, and see the implicit admission at R. 2719). Later, without explanation, Huleen told Gerber that he would not change the action already taken (R. 81, 275; 871).

Finally, Gerber appealed to President Allen, repeating his denial that he ever made any threats to employees (R. 871, G. C. Exh. 71). Pointing out that his accusers had not been identified, he submitted a list of all employees on his shift, asking that they be interviewed by Allen to determine whether the charges were true (G. C. Exh. 71). This last appeal was referred to one of Allen's assistants, who informed Gerber that he saw no reason to reconsider this case (R. 872, G. C. Exh. 72).

The Board found that Gerber was discriminatorily discharged because of his successful efforts to induce members of the Teamsters union to cancel their dues

deduction authorizations (R. 273-277). In so finding, the Board reversed its trial examiner who had credited at face value Morrell's testimony that he discharged Gerber because he had made threats to employees who would not join the IAM (R. 204). The Board in explaining its disagreement with the Trial Examiner, stated that "It is the Board's policy to adopt the Trial Examiner's credibility findings, except where the clear preponderance of all the relevant evidence convinces us that the Trial Examiner's resolution was incorrect" (R. 273). It concluded, from a review of the whole record, that Morrell's explanation could not be accepted as trustworthy (R. 273-277).

D. The Company refuses to recall employee Christina M. Nielsen because she files a charge with the Board

Employee Nielsen was first employed in 1942 (R. 173; 1955). She was a member of the IAM and participated in the strike (R. 173; 1956). When it was over she was returned to work in her former position (R. 173; 1957).

On March 3, 1950, she was laid off (R. 173; G. C. Exh. 172). She immediately protested to Foreman Graue that neither her workmanship nor seniority justified her selection (R. 173; 1959-1960). About a week later when she applied for rehire, she was assured by Ray Cottet in the personnel office that she would be recalled in a routine manner when the work load made it possible (R. 174; 1966).

In September 1950, she filed a charge with the Board against Boeing alleging that her layoff in March had been discriminatory (R. 174; 1967). She then returned to the personnel office and told Cottet

what she had done (R. 174; 1968). Within a day or two she heard from the Company's assistant labor relations manager, Huleen, that she was marked undesirable for rehire because of a poor work record (R. 174; 1969).

Noting the change in the Company's attitude towards rehiring Nielsen after she filed a charge with the Board, the Board found, reversing the trial examiner's conclusion but accepting his underlying findings (R. 215, 221), that she was discriminated against because of filing a charge (R. 280).

II. The Board's order

Based on its findings of unfair labor practices, the Board ordered the Company to cease and desist from (a) discouraging or encouraging membership in any labor organization by discriminating against employees; (b) discharging or otherwise discriminating against any of its employees because they filed charges with the Board; (c) assisting or supporting the Teamsters or any other labor organization; (d) promulgating or enforcing rules which prohibit union activity on nonworking time, or which prohibit employees from wearing steward or committeeman buttons, or which prohibit employees from wearing streamers or any other insignia indicating their adherence to any labor organization; and (e) in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by the Act (R. 285-286). Affirmatively, the Board ordered the Company (a) to offer reinstatement to Parezanin, Burrell, Haworth, Gerber,

Haddix, Myrick, McDonald, and Nielsen, and to make each of them, as well as Schott and Cinotto, whole for any loss of pay sustained as a result of the discrimination and (b) to post appropriate notices (R. 286-287).

ARGUMENT

I. The Board's finding that the Company violated Section 8 (a) (2) and (1) of the Act by assisting and supporting the Teamsters is supported by substantial evidence on the record considered as a whole

During a representation contest between the IAM and the Teamsters, the Company, which hoped for a Teamsters victory, actively assisted and supported that Union's organizational efforts. The whole of the Company's unfair labor practices amply supports this conclusion. We consider under this heading that part of its conduct wherein it gave preference to applicants for employment referred to it by the Teamsters; refused to permit the cancellation of Teamsters' check-off authorizations by its employees; revoked the promotion to a supervisory position of an employee named Carrig because of opposition from the Teamsters; and indicated to employees that they would have a better chance of retaining their jobs in an impending layoff if they were Teamsters members. This conduct gave assurance that many new employees would support the Teamsters, that that union would be in a favorable financial condition, that its prestige among employees would be enhanced at the expense of the IAM, and that employees could expect better treatment if they were Teamsters adherents. By thus attempting to "entrench the [Teamsters] among the

employees" (*Virginia Electric and Power Co. v. N. L. R. B.*, 319 U. S. 533, 540), it is clear that the Company failed in its duty to "maintain a strictly neutral attitude" (*N. L. R. B. v. Ronney & Sons Furniture Mfg. Co.*, 206 F. 2d 730, 735 (C. A. 9) certiorari denied, Jan. 18, 1954), and thereby violated Section 8 (a) (2) and (1) of the Act, as it has long been settled (*N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584; *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 78; *N. L. R. B. v. Idaho Refining Co.*, 143 F. 2d 246, 248 (C. A. 9); *N. L. R. B. v. Northwestern Mutual Fire Assn.*, 142 F. 2d 866, 868 (C. A. 9), certiorari denied, 323 U. S. 726; *N. L. R. B. v. Thompson Products*, 141 F. 2d 794, 799 (C. A. 9); *N. L. R. B. v. Carlisle Lumber Co.*, 94 F. 2d 138, 143, 144 (C. A. 9), certiorari denied, 304 U. S. 575).

We turn to consider the particular conduct involved in this branch of the case:

1. With respect to the finding that the Company gave preference for employment to applicants referred by the Teamsters, as shown (*supra*, pp. 5-7), five individuals, refused employment when they applied directly to Boeing, were hired immediately when they joined the Teamsters and obtained Teamsters' referral slips. To defeat the inference that referral by the Teamsters was the reason for hiring the employees despite the previous rejection of them, the Company asserts merely that the "effect of the referral is purely conjectural" (Br. p. 68). But it could hardly be coincidence that, as in the case of Heston (*supra*, p. 6), she should be previously rejected four times but hired at once on the same day that she joined the Teamsters and received a referral

slip from it; or, as in the case of Klein (*supra*, p. 6), that he should be rejected one day but hired the next day when he presented himself with a Teamsters referral slip; or, as in the case of Boitnott (Co. Br., pp. 68-69), that applying twice on the same day, he should be rejected the first time but accepted when he reapplied armed with a Teamsters referral slip. The Board was amply warranted in inferring that the relationship was not "merely coincidental";¹¹ it plainly sufficed to establish a prima facie case; and if there were other reasons than referral by Teamsters for the hire of these applicants by the Company, such information "lay exclusively within [the Company's] own knowledge," and it failed to introduce any persuasive evidence rebutting the prima facie case.¹² In this connection, the Company asserts (Br., p. 68), with respect to applicants Courtier and Brody only, that they "applied in September during a period when the Company had suspended hiring new applicants in order to return strikers to the payroll as soon as possible." But the facts are, as the Company's own records show, that the Company hired 748 new applicants in September 1948 and 780 in October (G. C. Exh. 212), which would hardly indicate that the failure to employ Courtier and Brody when they applied without a Teamsters referral slip had anything to do with a supposed policy against employing new appli-

¹¹ *N. L. R. B. v. Stone*, 125 F. 2d 752, 756 (C. A. 7), certiorari denied, 317 U. S. 649.

¹² *Montgomery Ward & Co. v. N. L. R. B.*, 107 F. 2d 555, 560 (C. A. 7); *Law v. N. L. R. B.*, 192 F. 2d 236, 237-238 (C. A. 10); *N. L. R. B. v. Wallick & Schwalm*, 198 F. 2d 477, 483 (C. A. 3).

cants in favor of strikers. The Company also relies upon "testimony of six other persons that they had [Teamsters] referrals and yet did not succeed in securing employment" (Br., p. 69). But these persons, unlike the applicants who were hired, had all participated in the illegal strike (*supra*, p. 3, n. 6), and for this reason they of course stand on a different footing from applicants referred by the Teamsters who were not associated with the strike.

2. Amply supported by the evidence (*supra*, pp. 7-9) and uncontroverted by the Company (Br., pp. 66-67, 69-70), the Board found that (1) the Company's employment rule, outstanding at all times, was to permit an employee to cancel any checkoff of union dues previously authorized by the employee, (2) pursuant to this rule IAM adherents induced many employees to cancel the checkoffs which they had previously authorized in favor of the Teamsters, (3) following such large scale cancellations, the Teamsters instituted checkoffs irrevocable for one year which they required applicants they referred to the Company to sign, and (4) despite its outstanding rule, and in the absence of any agreement with the Teamsters which was at no time recognized as the employees' bargaining representative, the Company nevertheless refused to permit an employee to cancel his irrevocable check off to the Teamsters but deducted union dues from his pay over his protests. That this conduct by the Company—forcing employees to continue contributions to the Teamsters despite the Company's own outstanding rule to the contrary—was assistance to the Teamsters need not be labored. Compare, *Vir-*

ginia Electric and Power Co. v. N. L. R. B., 319 U. S. 533, 540; *N. L. R. B. v. Idaho Refining Co.*, 143 F. 2d 246, 248 (C. A. 9); *N. L. R. B. v. Carlisle Lumber Co.*, 94 F. 2d 138, 143, 144 (C. A. 9), certiorari denied, 304 U. S. 575.

To defend its conduct, the Company relies on Section 302 (c), Title III, Labor-Management Relations Act (Co. Br., p. 70). But that section is beside the point. It first provides, under criminal sanction of fine or imprisonment or both for a violation (Sec. 302 (d)), that it "shall be unlawful for any employer to pay * * * or to agree to pay * * * any money to any representative of any of his employees * * *. (Sec. 302 (a).) It then excepts from this prohibition "money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." This section was enacted in the interest of the employee, its objective being to make sure that dues would not be deducted unless an employee authorized it in writing and also to prevent committing an employee for a period longer than one year. S. Rep. No. 105, 80th Cong., 1st Sess., 52 (Supplemental Views); H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 67; 93 Cong. Rec. 4678. But this section imposes no obligation upon the employer to check off union dues; whether he does or not is a matter for his own decision (subject to his duty to bargain in good faith with the exclusive bargaining

representative on the subject). Thus, in this case, it is sleeveless for the Company to point to Section 302 (c) as justification for assisting the Teamsters by refusing to cancel a check off authorization at an employee's request; the Company's departure from its own outstanding rule to honor such requests was not required by Section 302 (c) but was simply another instance of its desire to aid the Teamsters. That the check-off authorization was irrevocable for one year is a matter between the employee and the Teamsters. Section 302 (c) did not invest the Company with the power of a court to enforce any obligation between the employees and Teamsters with respect to their check-off arrangement. As before the amendment of the National Labor Relations Act, so now, "It is the purpose of the statute to see that the employer does not interfere or intrude into the affairs of the employees." *N. L. R. B. v. Security Warehouse*, 136 F. 2d 829, 832 (C. A. 9).

3. The Board found that the Company failed to promote an IAM adherent (Carrig) to a supervisory position because of the Teamsters' opposition (*supra*, p. 11). As shown (*supra*, pp. 10-11), despite the chief timekeeper's desire to promote Carrig, the Company's vice president vetoed the assignment; the chief timekeeper explained, as Carrig testified, that the promotion failed to go through because of opposition from the Teamsters with whom the vice president "was in bed." Objecting to this supporting evidence as hearsay, the Company nevertheless concedes that the chief timekeeper was "authorized to recommend Carrig for promotion and to advise him that he had not been

promoted * * *'' (Co. Br., p. 71). This authority obviously carried with it the authority to explain the reasons for not receiving a promised promotion; it would be strange to have a supervisor empowered to recommend promotions, to inform the employee of the decision, but to stand mute as to the reasons for the decision. And it is the settled rule that "Statements of an agent to a third person are admissible in evidence to prove the truth of facts asserted in them as though made by the principal, if the agent * * * was authorized to make, on the principal's behalf, true statements concerning the subject matter." Restatement, Agency, Sec. 286 (and see comments thereto). The Company claims that, "In any event, the incident is so trivial as not to amount to assistance and support" (Br., p. 71). But the failure to promote an employee at the instance of one union because of the employee's adherence to a rival union is hardly a trivial offense. See *N. L. R. B. v. Bell Aircraft Corp.*, 206 F. 2d 235 (C. A. 2).

4. To defeat the Board's finding that through its assistant foreman the Company warned employees that they would have a better chance of retaining their jobs in an impending layoff if they were members of the Teamsters (*supra*, pp. 11-12), the Company contends that these warnings were isolated (Br., p. 29). Acceptance of this view requires disregard of the Company's whole pattern of preference for the Teamsters to which these incidents are related. The same rule which requires that the whole of the record be considered before sustaining a Board finding requires that the whole of the record be taken into account be-

fore disregarding as isolated admitted warnings consistent with and representative of the Company's entire attitude and conduct.

II. The Board properly found that the Company violated Section 8 (a) (1) of the Act by the following rules: (1) The rule prohibiting employees from wearing IAM steward and committeeman buttons; (2) the rule prohibiting employees from wearing "I am loyal to 751" streamers; and (3) the rule applied by some supervisors which prohibited union activity on nonworking time

1. *The rule prohibiting employees from wearing IAM steward and committeeman buttons:* As shown (*supra*, pp. 13-14), the Company forbade the wearing of buttons by employees identifying them as IAM committeemen and stewards; one employee (Burrell), who refused to remove his IAM committeeman button on request, was for this reason suspended indefinitely by the Company. If the rule forbidding the wearing of committeemen and steward buttons was invalid, there is no question that the employee's indefinite suspension for its infraction was likewise invalid. *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793, 805.

That the rule was invalid is settled by the Supreme Court's decision in *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793. The sole justification advanced by the Company for banning the wearing of committeemen and steward buttons was that "we have no union and nothing is recognized" (*supra*, p. 14). As explained by the Company's vice president in charge of industrial relations (R. 365), the buttons were banned "because they were not authorized by any existing contract; there were no shop

committeemen in the plant, hence why wear buttons?" It was precisely this argument which was advanced by the employer in the *Republic Aviation* case (324 U. S. at 801):

Petitioner looked upon a steward as a union representative for the adjustment of grievances with the management after employer recognition of the steward's union. Until such recognition petitioner felt that it would violate its neutrality in labor organization if it permitted the display of a steward button by an employee. From its point of view, such display represented to other employees that the union already was recognized.

The Supreme Court rejected this argument; agreeing with the Board that such rules "against the wearing of insignia must fall as interference with union organization" (324 U. S. at 803), the Supreme Court quoted with approval from the Board's decision (324 U. S. at 802, n. 7):

We do not believe that the wearing of a steward button is a representation that the employer either approves or recognizes the union in question as the representative of the employees, especially when, as here, there is no competing labor organization in the plant. Furthermore, there is no evidence in the record herein that the respondent's employees so understood the steward buttons or that the appearance of union stewards in the plant affected the normal operations of the respondent's grievance procedure. On the other hand, the right of employees to wear union insignia at work has long been recognized as a reasonable and

legitimate form of union activity, and the respondent's curtailment of that right is clearly violative of the Act.

In its brief (p. 24), excising that portion of the Board's language concerning the impermissibility of banning union insignia "especially when * * * there is no competing labor organization in the plant," the Company claims that since the IAM was in competition with the Teamsters the banning of IAM steward and committeeman buttons was proper. But this is a gross shift in meaning. A rule which is without warrant "especially" in the absence of competing unions does not have warrant because of the lack of the parenthetical special factor; a further "especial" reason for the rule's invalidity cannot be transformed into the sole reason for invalidating the rule. In this case, the wearing of IAM steward and committeeman buttons could hardly mislead any employee into believing that the Company was recognizing the IAM. Even before the members of the IAM ended their strike and returned to work, the Company frequently and widely advertised that the IAM had lost its representative status by authorizing the strike (*supra*, p. 3, n. 6). After the strike, it was no secret that the Company favored the Teamsters in the latter's active campaign to secure designation as bargaining representative. In addition employees knew that an election had been scheduled by the Board for the sole purpose of determining which union, if any, would represent them. The Company's asserted maintenance of neutrality in these circumstances is a

hollow reason for prohibiting the wearing of IAM steward and committeeman buttons.

Furthermore, as was conclusively settled in *Republic Aviation*, that a union is not currently recognized as bargaining representative is no reason to forbid wearing of steward or committeeman buttons. The Company erroneously assumes that the only function of the union steward is to represent employees where there is a collective bargaining relationship with the employer. The fact is that it is common practice to select shop stewards before any bargaining relationships are established. Their function, in such cases, is not to deal with the employer, but to act as an intermediary between the employees and the union in such matters as "collecting union dues" from members, keeping "the members informed of union activities and organization policies," providing "leadership in all internal union questions," "signing up union members," and the like. (See *Preparing a Steward's Manual*, Bull. No. 59, Dept. of Labor, Division of Labor Standards, pp. 5, 13-14 (1943).) Thus, a union's designation of certain members to act as stewards at a particular plant is not dependent on its having achieved a collective bargaining status and the right of employees to wear such buttons is unaltered by the fact that "no union was recognized."

The Company further urges that "unusual circumstances" existed in this case and that "unusual circumstances" were recognized in *Republic Aviation* (324 U. S. at 804-805) as justifying qualification of the otherwise existing right to wear IAM steward

and committeeman buttons. Those unusual circumstances are stated to be the bitterness engendered by the strike which required curtailment of union activity in order to prevent an outbreak of violence between IAM and Teamsters adherents.¹³ (Co. Br., pp. 24-25.) It suffices to say at this point, as the Board observed (R. 272), that this was never advanced as the reason for the rule by the Company even at the time of hearing, its sole explanation for the rule being the grounds previously discussed. It is unnecessary to labor the unreliability of a reason which is a "palpable afterthought" (*N. L. R. B. v. Wells, Inc.*, 162 F. 2d 457, 459 (C. A. 9)); the Company cannot convincingly justify its rule by ascribing it to

¹³ It was on this ground that the trial examiner *sua sponte* apparently held the Company's rule against wearing IAM steward and committeeman buttons to be privileged (R. 206). The examiner nevertheless held that the indefinite suspension of employee Burrell for infraction of this rule was invalid (R. 206-207). He explained that: "I have accepted as believable and reasonable Respondent's explanation that the atmosphere in the plant for a period following the end of the strike was sufficiently tense and unfriendly as to require the Respondent to impose strict rules of conduct upon employees to avert possible violence and I have considered the case of Stanley Burrell in this light. However, I am unable to agree with the contention of the Respondent that its action in discharging Burrell was reasonably related to the accomplishment of this result. I do not understand how it could be that the wearing of a badge indicating an individual to be a committeeman for a labor organization, even though such office lacked any sanction from the Respondent, was such a manifestation of union adherence as would probably provoke dispute. I find that Stanley Burrell had a right to wear a badge indicating that he had been designated by Lodge 751 as a committeeman and that Respondent's discharge of him when he refused to remove it discouraged membership in and activity on behalf of Lodge 751 and that the Respondent thereby violated Section 8 (a) (3) and (1) of the Act."

unusual circumstances which did not occur to it as the reason for promulgating the rule. This aside, we show under the next heading the lack of merit to the Company's claim of unusual circumstances.

2. *The rule prohibiting employees from wearing "I am loyal to 751"¹⁴ streamers:* As shown (*supra*, pp. 14-15), the Company forbade the wearing by employees of four-inch ribbons stating "I am loyal to 751"; an employee, refusing to remove this ribbon upon request, was suspended by the Company for three days. As with the rule against wearing IAM steward and committeeman buttons, if the rule against wearing these ribbons was invalid, the suspension for refusing to obey the rule was also invalid (*supra*, p. 38). And since, as was settled in *Republic Aviation*, the wearing of union insignia in the form of steward buttons is protected against employer infringement, the wearing of four-inch union ribbons is obviously in the same protected class.

According to the Company's vice president in charge of industrial relations (R. 360), "We would not permit them to wear the streamers, because they were incendiary, and inflammatory in nature; our problem was to stop any inflammatory matters and fighting." The trouble with the Company's claim is that there is no reasonable relationship between wearing union ribbons and provoking disorder. The same official of the Company admits that (R. 360): "The standard union identification button has always been worn in our plant, before, during and subsequent to the strike; we have never objected to it." But there is no

¹⁴ "751" was the local designation of the IAM.

difference, except an insignificant one of size (the ribbon being slightly larger), between a union ribbon and an ordinary membership button. Both insignia simply display adherence to the union represented. The inscription on the ribbon expresses nothing that an ordinary membership button does not imply, namely, that the wearer is loyal to his union. If the button provokes no disorder, neither does the ribbon. Nor was there evidence that the Company ever voiced concern about a disorder to the employees directed to remove their ribbons, or that any such disorders ever occurred as a result of their display. In short, the wearing of the "I am loyal" ribbons neither provoked nor connoted more than did the wearing of ordinary membership buttons during an organizational campaign. There is no basis in reason for justifying the ban of union ribbons because of plant tension and strike bitterness where the Company itself discerned in that situation no reason for prohibiting the indistinguishable activity of wearing membership buttons.

As the Board further explained in rejecting the contention "That these rules were necessary in order to prevent friction and clashes between adherents of the rival unions" (R. 271) :

The [Company] had adopted other rules, such as those prohibiting name calling or derogatory remarks, which would accomplish the same results. Furthermore, it is to be noted that the [Company] permitted organizers for both unions to have unrestricted access to contact employees during working hours at different times, a practice plainly more likely to be

productive of clashes and disruptive of production than wearing insignia. * * * As for the "I am loyal to 751" streamers, we find no reasonable basis in the record upon which it can be said that they are any more inflammatory, or any more likely to provoke clashes or other types of disorder, than any other manifestation of union adherence, such as a membership button.

The Board's determination that the so-called unusual circumstances assigned by the Company did not warrant qualification of the rights otherwise vouchsafed the employees is a judgment especially entitled to respect because "made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793, 800. Nor did the amended Act "negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 488. "Particularly in this area of mixed fact and law, a court will not lightly disregard the overall appraisal of the situation by the Labor Board * * *" *N. L. R. B. v. Reed and Prince Mfg. Co.*, 205 F. 2d 131, 134 (C. A. 1), certiorari denied, 74 S. Ct. 139.

3. *The rule applied by some supervisors which prohibited union activity on nonworking time:* As shown (*supra*, pp. 12-13), many employees following their re-

turn to work after the strike were instructed by their supervisors to refrain from all union activity on Company property at any time, working or nonworking.¹⁵ It is now well settled that such an unlimited restriction "must be presumed to be an unreasonable impediment to self-organization * * * in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793, 804, n. 10, quoting with approval from *Peyton Packing Company*, 49 N. L. R. B. 828, 843-844. See also, *N. L. R. B. v. American Tube Bending Co.*, 205 F. 2d 45, 46 (C. A. 2); *N. L. R. B. v. Lake Superior Lumber Co.*, 167 F. 2d 147 (C. A. 6); *N. L. R. B. v. La Salle Steel Co.*, 178 F. 2d 829, 833-834 (C. A. 7), certiorari denied, 339 U. S. 963.

The Company makes no attempt to justify this restriction on the basis of special circumstances. It contends only that "there is no evidence that the rule in question was ever enforced," and while conceding that it never "repudiated" the restriction, it claims in extenuation that it was not "brought to the attention of the higher echelons of management in order to permit repudiation" (Co. Br., pp. 28-29). The defense is without merit. The inhibitory effect flows from the mere existence of the restriction with-

¹⁵ In its brief (p. 27), the Company states that only five employees so testified, but the fact is that eight employees testified to having been instructed to this effect (*supra*, p. 12), one in the presence of five or six other employees (R. 906). Furthermore, according to the testimony of three supervisors (R. 3159-3161, 3184-3185, 3195-3196), they issued these instructions to *all* the employees working under them, although it does not appear how many there were.

out the need for its enforcement. That there was no enforcement may have resulted from no circumstance other than that no employee attempted to breach the restriction. Employees who breached the prohibition against wearing IAM ribbons and steward buttons had been suspended; the employees had no reason to suppose that the same would not be true of the breach of this restriction. Nor is it sound for the Company to claim that, since higher management was unaware of this restriction, no account should be taken of the failure to repudiate it. Absence of repudiation left the full force of the restriction intact. Higher management had put the supervisors in the position to impose the restriction; it was up to management to monitor the exercise of conferred power. Employees have every reason to believe that supervisors do what management expects them to do. And so management is properly responsible for dissipating the effect of supervisory conduct. *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 78; *H. J. Heinz Co. v. N. L. R. B.*, 311 U. S. 514, 518-520; *N. L. R. B. v. Link-Belt Co.*, 311 U. S. 584, 598.¹⁶ See also, Restatement, Agency, Vol. I, Sec. 8, Comment on.

III. The Board properly found that the Company violated Section 8 (a) (3) and (1) of the Act by discriminating against seven employees either because of their membership and activities on behalf of the IAM or opposition to the Teamsters

The Board found that the Company discriminated against seven employees either because of their IAM

¹⁶ The Company's reliance (Br., p. 28) on *Ohio Associated Telephone Co. v. N. L. R. B.*, 192 F. 2d 664, 668-669 (C. A. 6), is misplaced. In that case a *repudiated* and unenforced restriction *in the absence of other unfair labor practices* was held to be uncoercive. There is no parallel between that case and this.

proclivity or their Teamsters antipathy. As to two of these employees (Parezanin and Haworth, *supra*, pp. 17, 18), the Board and its trial examiner were in agreement; as to four other of the employees (Haddix, Schott, Myrick, and McDonald, *supra*, pp. 20, 22, 24, 25), the Board accepted all of the examiner's underlying findings but disagreed with his ultimate conclusion and found that these employees had been discriminated against; as to the seventh employee (Gerber, *supra*, p. 29), the Board found that this employee had also been discriminated against, and this conclusion rested in part upon its reversal of a credibility determination of the examiner. Except with respect to the latter employee,¹⁷ the Company, in contesting the Board's conclusions, states that it accepts all the credibility determinations adopted by the Board, but differs with it "solely as to the weight to be given the credited evidence and the inferences which may reasonably be drawn therefrom * * *" (Co. Br., p. 31). Thus, the Company requests this Court to reweigh the evidence and draw its own inferences and on this basis to reverse the Board's conclusions.

The Company assumes a standard of judicial review of administrative findings which is patently erroneous. As this Court has explained more than once, "where the evidence fairly supports * * * conflicting inferences the Board's choice may not be displaced, even though we might reach a different conclusion if the matter were before us *de novo*." *N. L. R. B. v. L.*

¹⁷ We discuss this employee, and the special question of the standard of judicial review applicable to this case, separately, *infra*, pp. 56-63.

Ronney & Sons Furniture Mfg. Co., 206 F. 2d 730, 737 (C. A. 9), certiorari denied, Jan. 18, 1954; *N. L. R. B. v. San Diego Gas and Electric Co.*, 205 F. 2d 471, 475 (C. A. 9); *N. L. R. B. v. West Coast Casket Co., Inc.*, 205 F. 2d 902, 906-907 (C. A. 9). "In cases arising under the National Labor Relations Act, the courts are not permitted to weigh the evidence, resolve its conflicting inferences, nor draw their own inferences therefrom." *N. L. R. B. v. W. C. Nabors*, 196 F. 2d 272, 275 (C. A. 5), certiorari denied, 344 U. S. 865; *N. L. R. B. v. Southland Mfg. Co.*, 201 F. 2d 244 (C. A. 4). To show that evidence is capable of disparate interpretation is to show a reason for confirming, not rejecting, the inference reasonably drawn by the Board. *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 488.

It is for this reason that it makes no difference, in the case of the four employees as to whom the Board accepted the examiner's underlying findings, that the Board disagreed with the examiner in evaluating the import of the subsidiary facts. In this situation, as the Company does not dispute, since the significance of an examiner's report "depends largely on the importance of credibility in the particular case" (*Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 496), and the examiner's rejected inferences do not rest on his superior advantages in determining credibility, they are entitled to no independent weight as a factor detracting from the Board's conclusion. *N. L. R. B. v. Akin Products Co.*, 33 L. R. R. M. 2280 (C. A. 5, December 22, 1953); *Morand Bros. Beverage Co. v. N. L. R. B.*, 204 F. 2d 529, 533-535 (C. A. 7), cer-

tiorari denied, 346 U. S. 909; *N. L. R. B. v. Globe Wireless, Ltd.*, 193 F. 2d 748, 751-752 (C. A. 9). It is the Board's findings, not those of the examiner, which the statute states "shall be conclusive" when "supported by substantial evidence on the record considered as a whole." Section 10 (e) of the Act.

We now show that "the most that can be said in favor of [the Company] on the question of fact is that the evidence permits conflicting inferences, and that is not enough." *Texas & N. O. R. Co. v. Brotherhood of Ry. S. Clerks*, 281 U. S. 548, 559.¹⁸

1. Don J. Parezanin

The facts with respect to the discharge of Parezanin are summarized *supra*, pp. 16-17. As shown, while Parezanin was suspended by his supervisor for the nondiscriminatory reason that he had absented himself from the shop without permission, at the Company hearing on the suspension it was clear that the suspension was transformed into a permanent discharge for the discriminatory reason of having participated in the IAM strike¹⁹ and thereby showed the unreliability of his loyalty to the Company. Thus, at

¹⁸ The same erroneous approach to judicial review underlies the Company's treatment of the questions of assistance, discussed *supra*, pp. 32-33, as reflected in its statement that "the evidence * * * relied upon by the Board does not preponderate in support of its finding that Boeing unlawfully assisted and supported Local 451" (Co. Br., p. 71).

¹⁹ The Company does not contest that, once having restored Parezanin to employment, it was thereafter no longer free to rely upon the unlawfulness of the strike as a reason for discriminating against him. In addition to the discussion at R. 194-198, see also *N. L. R. B. v. E. A. Laboratories, Inc.*, 188 F. 2d 885 (C. A. 2), certiorari denied, 342 U. S. 871; *N. L. R. B. v. Wallick & Schwalm*, 198 F. 2d 477, 483-484 (C. A. 3).

the Company hearing, Superintendent Molitor charged that Parezanin's participation in the IAM strike was an act of disloyalty to the Company, and refused to accept Parezanin's "pledge" that he would be "loyal" to the Company in the future. Molitor denied making this statement but the discrediting of his denial raises merely a question of credibility which the Company agrees is not open on judicial review. In the context of the Company's hostility to the IAM and partiality for the Teamsters, the credited evidence amply supports the Board's conclusion that Parezanin was discharged for discriminatory reasons.

2. Jack Haworth

The facts with respect to the discharge of Haworth are summarized *supra*, pp. 17-18. As shown, while Haworth's immediate supervisor recommended only a three-day suspension for failing to follow directions, Haworth was discharged instead of briefly suspended because, in Foreman Megorden's words, Haworth "was at that time very closely connected with the union activities going on at the plant there." It is fundamental that a discharge motivated by an employee's "union activities" is unlawful.

The Company contends, in the face of Foreman Megorden's admission, that the Board's finding is unsupported by substantial evidence. But there is no gainsaying its foreman's frank expression of his anti-union motivation. Foreman Megorden was neither unaware of what he was saying nor were his remarks taken out of context. Megorden made the statement that Haworth "was at that time very closely

connected with the union activities going on at the plant" in answer to a direct question by one of Company's own counsel, Mr. Coie, about Haworth's conduct at work (R. 3173). On cross examination, Megorden reiterated the "charge" against Haworth (R. 3181, 3183), and reported in addition that the information was conveyed to him by Pickett, Haworth's assistant foreman, who "knew those who were the ringleaders" in the Union (R. 3182). Elaborating further, Megorden readily identified the "union" referred to as the IAM (R. 3182). Ample evidence thus supports the Board's conclusion that Haworth's union activities were the reason for his discharge. That there may have been adequate non-discriminatory reasons for which he could have been discharged makes no difference if these were not the moving cause. *Wells, Inc. v. N. L. R. B.*, 162 F. 2d 457, 460 (C. A. 9); *N. L. R. B. v. Ronney & Sons Furniture Mfg. Co.*, 206 F. 2d 730, 737 (C. A. 9), certiorari denied, Jan. 18, 1954.

3. Madeline Haddix

The evidence with respect to the layoff of Haddix is summarized *supra*, pp. 18-21. As shown, a few weeks before the layoff of Haddix, a generally satisfactory worker, her foreman wondered "who will be next" to go in an impending layoff, and then turning to Haddix said, "The trouble with you is that you belong to the wrong union." Told that her layoff was temporary and that she would be recalled, Haddix's repeated requests for reemployment were nevertheless denied without any credible explanation being

offered and despite the fact that a foreman specifically requested her assignment for work to his department. At the hearing, two foremen, James and Welling, testified that Haddix's layoff was occasioned by cancellation of a B-54 contract. But one of these foremen, James, was on vacation at the time of the layoff and did not participate in the layoff decision (R. 2684-2685); hence his explanation carries no weight. As to the cancellation of the B-54 contract assigned as the reason for the layoff by the other foreman, Welling, this contract was cancelled in April 1949 and resulted in layoffs during April and May of that year. But Haddix was not laid off until October 21, 1949, and thus well after the impact on employment of the B-54 contract cancellation. These circumstances amply support the inference that the reason for the layoff was belonging "to the wrong union," an inference strengthened by the inadequacy of the explanation for the layoff (*N. L. R. B. v. Dant*, 207 F. 2d 165, 167 (C. A. 9)), and by the lack of credible explanation for the failure to recall Haddix despite the statement that her layoff was temporary.

The Company contends (Br., p. 48) that the explanation concerning the B-54 contract cancellation in April was a slip of the tongue and that the foremen meant to refer to the layoffs occasioned by the "complete rescheduling of the B-50 contract" in August (R. 325). The Board is entitled to assume that knowledgeable aircraft foremen do not mean B-50 rescheduling when they refer to B-54 cancellation. The foremen were examined at the hearing by Company counsel who it is fair to assume would have

corrected their testimony if it were inadvertently inaccurate; it is sheer speculation to suppose that all were in error. The Company has thus advanced no ground adequate to justify displacement of the Board's fairly drawn inference.

4. Dorothy Schott

The evidence with respect to the demotion of Schott is summarized *supra*, pp. 21–22. As shown, Schott, an employee of the Company for many years, was demoted to a beginner's job shortly after the strike in which she participated as an IAM adherent. Commenting on her demotion, upon noticing that she wore an IAM union membership button, Assistant Foreman Lawrence said: "Well, Holy God, you have got the wrong button." Although the Company claimed that a surplus of welders required the downgrading, it made no explanation as to why Schott particularly was selected for demotion over other welders. The Board's inference that membership in the IAM was the reason for Schott's selection is thus reasonably based.²⁰

²⁰ No exception having been filed by the General Counsel to the trial examiner's failure to find that Schott's demotion was discriminatory, the Company contends that the Board may not review the question (Br., p. 55). If no exceptions are filed to any part of the examiner's report by any party, the Board may not review the examiner's report (Section 10 (c) of the Act); but if some exceptions are filed, as they were here, then the entire report of the examiner is open to inquiry, and the Board in its discretion to serve justice may review even that part of the report to which no exception was filed. See, *Salant & Salant, Inc.*, 87 N. L. R. B. 215, notes 2 and 3; *International Rice Milling Co.*, 84 N. L. R. B. 360, set aside, 183 F. 2d 21 (C. A. 5), reversed in part, 341 U. S. 665, setting aside an order to which no exceptions had been filed

5. Claude C. Myrick

The evidence with respect to the layoff of Myrick is summarized, *supra*, pp. 22-24. As shown, Myrick was a leader in the IAM, and upon his return to work after the strike, he was on one occasion instructed to remove his IAM committeeman button at the risk of discharge for disobedience, and on another warned to discontinue union discussion lest he be discharged for it. Thereafter, he was questioned by one foreman about his attitude if he were to be made a union steward again; told by another foreman that he would do better if he forgot "the unionism angle"; and warned by still another foreman that his layoff was contemplated because of his union activity. Myrick was laid off without any explanation; at the time of layoff he had next to the highest seniority standing in his department; and according to the testimony of two foremen and the superintendent, Myrick was a skillful employee.

The Company contends (Br., p. 51) that the "proper conclusion to be drawn from the record is that Myrick's slowness was the motivating reason for his layoff." To say the least, however, the circumstances disclosed fairly support the inference that Myrick's prominent union activity caused his selection for layoff. As between the two inferences, the one drawn by the Board being reasonable, that ends the matter.

by union against which order ran and where the only exceptions filed were by General Counsel and employer complaining that order was not sufficiently broad.

6. Clyde N. McDonald

The evidence with respect to the layoff of McDonald is summarized, *supra*, pp. 24-25. As shown, McDonald was discharged within minutes after he rebuffed a professional Teamsters organizer with the remark that if ever he joined an A. F. of L. union it would be the Electrical Workers not the Teamsters. His precipitous discharge, coming without explanation, was effected by Foreman Dietz, who after a report from the Teamsters organizer told McDonald to "get your stuff together, and clear out."

Though contending that McDonald was laid off "because one of least qualified" (Br., p. 53), the Company's contention is unsupported by any testimony by Foreman Dietz, the moving party in McDonald's discharge, who neither at the hearing nor at the time of the layoff explained the reason for McDonald's selection. The only testimony concerning either the recency of McDonald's employment or his skill came from the general foreman who acknowledged that he had no recollection of McDonald as an individual. Nor did the Company call any of McDonald's immediate supervisors to testify as to his proficiency.

The circumstances thus amply support the Board's inference that express preference for the IAM and express opposition to the Teamsters was the occasion for McDonald's selection for layoff.

7. Arthur C. Gerber

The evidence with respect to the discharge of Gerber is summarized, *supra*, pp. 25-29. The Board's finding

that Gerber was the victim of discrimination differs from its other findings of discrimination in that in this instance it rests in part upon the reversal of a credibility determination made by the examiner. Since the examiner's credibility determination may have been based on his observation of the witnesses, we agree with the Company that due regard to the demeanor evidence which the printed record does not preserve requires that an examiner's findings "on veracity must not be overruled unless a very substantial preponderance of the evidence is against such conclusion" (Co. Br., p. 38). But giving weight to the demeanor evidence, discounted by its failure to correspond with the "consistency and inherent probability of testimony" (*Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 496), we now show that the Board's conclusion is reasonably grounded, the examiner's credibility determination reasonably rejected, and that therefore the Board's finding should stand in "answering the comprehensive question whether the evidence supporting the Board's order is substantial" (*Id.*, at 497).

(a) We begin with the concurrent findings of the examiner and the Board concerning the events preceding and contemporaneous with the discharge of Gerber which are the context of the discharge and disclose the true reason for it. As shown ²¹ (*supra*, pp. 7-9, 26), Gerber, a timekeeper, was in the forefront of the movement to encourage members of the Teamsters to cancel their Teamsters dues deduction authorizations

²¹ In uninterrupted sequence the testimony relevant to Gerber's discharge appears at R. 851-880, 2712-2719, 4137-4140.

and thereby to "get out of the Teamsters." To this end he wrote an article acquainting Teamsters members with the procedure for revoking checkoff authorizations and urging them to resort to it. The article was successful, resulting in a notable increase in cancellations, many of them handled by Gerber himself. The Company's displeasure was manifest. Supervisors previously amicable became unfriendly towards Gerber; and revocation of dues deduction authorizations, previously the function of the timekeepers, was transferred to the personnel department. And the extent to which Teamsters checkoff cancellations were unfavorably regarded by the Company was later strikingly confirmed when, the Teamsters having adopted "irrevocable" check-off authorizations, the Company departed from its own plant rule and assisted the Teamsters by refusing at the request of employees to cancel checkoffs on behalf of the Teamsters (*supra*, pp. 9, 34-36).

This was the context of Gerber's discharge. The article he wrote was published on November 18, 1948, widely distributed 2 or 3 days later, and resulted in the following week in a marked increase in Teamsters check-off cancellations (R. 864-867). On December 7, a short ten days later, without previous warning or indeed intimation, Gerber was summarily discharged, his termination notice stating "making threats to fellow employees" (*supra*, p. 26).

(b) Accordingly, the question reduces to whether the reason for Gerber's discharge is to be found in "making threats to fellow employees" or in inducing fellow employees to cancel dues deductions on

behalf of the Teamsters. Testimony ascribing Gerber's discharge to threats came from the chief time-keeper, Lynn Morrell, who was Gerber's ultimate supervisor. Acceptance of this testimony was the reason for the trial examiner's finding that Gerber was not discriminated against, the examiner stating "I credit the testimony of Lynn Morrell that he reasonably believed Gerber to be guilty of making threats to those who would not join Local 751 [IAM]" (R. 204). It therefore becomes critically important to examine this testimony closely in order to determine whether it is worthy of credence.

Morrell testified, (1) that the supervisor of the shop in which Gerber was working informed him of reports from "the personnel in his department that Mr. Gerber was making threatening statements to them, that if they did not join 751, they would be out of a job in 30 days" (R. 2713); (2) that together with the supervisor he investigated these reports speaking "to six or seven, possibly eight" employees, all of whom confirmed the reported threats (R. 2713); (3) that following these oral interviews, "some said they would and some said they would not" make "a written statement, for record purposes" (R. 2714); and (4) that written statements were "subsequently obtained" from the employees which "confirmed their oral statements" and "on the basis of that" Morrell participated in recommending Gerber's dismissal (R. 2714). On cross-examination, Morrell reiterated several times that he did not effect Gerber's discharge until after he had *personally* received and considered "*written* statements" (R. 2715-2716,

emphasis supplied). At the conclusion of his testimony, Morrell fixed the written character of the statements, that he personally received them, and their relationship in time to Gerber's discharge in the following questions and answers (R 2716-2717):

Q. Who prepared the statements?

A. They wrote them out themselves, in their own handwriting, and signed them.

Q. Do you still have these statements?

A. I don't have them myself, no.

Q. Do you remember when they were prepared?

A. Well, after the threats were made—within—well, I would say within a week from the time we first checked up on them until the statements were ready.

Q. And how soon after getting the statements did you terminate Gerber?

A. Oh, I would say within 2 or 3 days, approximately.

At the outset, we put to one side the Company's objection that Morrell did not testify that "he secured written statements and thereafter arranged for Gerber's discharge" (Co. Br., pp. 39-40); that is the heart of his testimony, its inescapable purport, and it is bootless to contend otherwise. Yet that testimony, as we now show, was flatly contradicted by the Company's own records and by the admissions of the Company's assistant labor relations manager.

Gerber was discharged on December 7 (R. 853, 4138). According to Morrell, he effected that discharge 2 or 3 days after obtaining the written statements. But according to the Company's records and the admission of its assistant labor relations

manager, no written statements were obtained until December 16, nine days after Gerber had already been discharged (R. 2726). According to Morrell, he personally participated in obtaining and reviewing the written statements. According to the Company's own records and the admission of its assistant labor relations manager, Morrell played no part in securing or considering the written statements (R. 2726, 2723-2724).

These are not peripheral contradictions but go to the heart of Morrell's testimony. Its essence was to convey the impression of a carefully considered discharge effected only after securing written confirmation of oral reports of threats. But the fact is, indisputably established by documentary evidence, that there was no consideration of written statements before the discharge, indeed no written statements at all until 9 days after the discharge, and Morrell played no part in securing those statements. Morrell's testimony was therefore either fabricated or so mistaken as to be worthy of no credence.²²

(c) We turn now to consider what the record actually discloses concerning asserted threats by Gerber, mindful in this connection that the main prop underpinning this claimed basis for the discharge has been broken.—From oral reports of threats supposedly

²² In crediting this testimony the examiner took no account of its inconsistency with the documentary evidence, an inconsistency which observation of demeanor is incapable of resolving in favor of the witness' credence. Nor did the examiner evaluate this testimony in the light of Gerber's conduct in securing Teamsters check-off cancellations, conduct distasteful to the Company and followed swiftly by Gerber's discharge.

given by "six or seven, possibly eight" employees (R. 2713), we reduce to four written statements given by employees 9 days after the discharge (R. 2726), and only one of these statements suggests a threat even remotely (R. 2726, 2728). According to this statement, "Mr. Gerber told me that 751 was going to win the strike rights, and that I wouldn't have a job after 30 days they took over."

At best this statement only inconclusively establishes a threat. It may be merely the employee's garbled version of the accurate and unthreatening statement that if the IAM is selected as the exclusive bargaining representative and secures a union-shop agreement requiring acquisition of membership by employees within 30 days as a condition of employment, employees who fail to comply with the agreement may lose their jobs (Sec. 8 (a) (3) of the Act). At any rate, it is undenied that Gerber was never given any opportunity either to explain or deny this statement before his discharge, the discharge being effected without warning; at no time, before or after the discharge, were Gerber's accusers identified to him despite his request for their identification (*supra*, p. 27); Gerber appealed through every step of the managerial hierarchy protesting his innocence, requesting full investigation (*supra*, pp. 27-28); and at the hearing before the Board, Gerber explained in detail his blameless version of the incident with the employee whom he had purportedly threatened (R. 877-878). And it is to be observed that the examiner did not find that Gerber made threats, but only that Morrell reasonably believed he did (*supra*, p. 59),

and we have shown that Morrell's testimony is unworthy of credence.

Looking at the situation from the viewpoint most favorable to the Company, what emerges irreducibly is that supposedly for a single inconclusive threat (if threat there be) an employee of six years' standing is abruptly fired. Thus we have a "long-time, responsible and faithful" employee "discharged summarily, without preliminary warning, admonition or opportunity to change the act or practice complained of. Such action on the part of an employer is not natural. If the employer had really been disturbed by the circumstances it assigned as [the] reason * * * for the * * * discharge * * *, and had had no other circumstance in mind, some word of admonition, some caution that the offending lapse be not repeated, or some opportunity for correction of the objectionable practice, would be almost inevitable." *Anthony & Sons v. N. L. R. B.*, 163 F. 2d 22, 26-27 (C. A. D. C.), certiorari denied, 332 U. S. 773. The conduct of the Company here is not that of a nondiscriminatorily minded employer but of an employer whose "true motive for Gerber's discharge," as the Board reasonably concluded (R. 276), "may be found in his successful efforts to induce members of Teamsters Local 451 to cancel their dues deduction authorizations."

IV. Substantial evidence supports the Board's finding that the Company violated Section 8 (a) (4) of the Act by refusing to rehire Catherine Nielsen because she filed a charge with the Board

The evidence with respect to the refusal to rehire Catherine Nielsen is summarized *supra*, pp. 29-30. As

shown, when first laid off she was advised by the Company that she would be recalled in normal course when the workload permitted; but after she informed the Company that she had filed a charge with the Board alleging that her layoff was discriminatory, she was advised that she was unsuitable for rehiring. Section 8 (a) (4) of the Act makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." As recently pointed out, "Such breadth of statutory language is consistent only with an intention to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *John Hancock Mutual Life Ins. Co. v. N. L. R. B.*, 191 F. 2d 483 (C. A. D. C.). See also, *N. L. R. B. v. Northwestern Mut. Fire Assn.*, 142 F. 2d 866 (C. A. 9), certiorari denied, 323 U. S. 726. Clearly the refusal to rehire Nielsen because she filed a charge with the Board violated the plainest prohibition of the Act.

The Company contends by way of defense that the real reason Nielsen was told that she was unacceptable for rehire was her poor production record (Co. Br., p. 61). Contradicting this assertion, however, is the admission of Assistant Superintendent Graue at the hearing "that there was nothing in her file which would prevent rehire, or a recommendation for employment elsewhere" (R. 2808), and that following a correction in her misapprehension of the scope of her duties, "her output was up to the point where it was satisfactory * * *" (R. 2818). In addition, before she filed her charge with the Board, Nielsen

was assured by the Company's personnel office, which of course had access to her record, that she would be rehired as soon as the workload permitted (R. 1966). Finally, it is a singular circumstance that an employee of six years' standing should suddenly be discovered to be an unsatisfactory producer. Under these circumstances, the Board reasonably concluded that the Company's refusal to consider Nielsen for rehire only after she filed a charge was discriminatorily motivated and in violation of the Act.

V. The allegations of the complaint with respect to the discrimination practiced against employees Haddix, Myrick, McDonald and Schott are adequately supported by charges timely filed within the meaning of Section 10 (b) of the Act

Section 10 (b) of the Act provides in part that:

* * * no complaint shall issue based upon any unfair labor practices occurring more than six months prior to the filing of the charge with the Board * * *

The Company contends (Br., p. 72) that no timely charge was filed adequate to support the allegations of the complaint that Haddix and Myrick were discriminatorily laid off on October 21, 1949, that McDonald was discriminatorily laid off on August 9, 1949, and that Schott was discriminatorily demoted on April 18, 1949. As found, Haddix was selected for layoff because she belonged to the IAM, "the wrong union" (*supra*, pp. 52-54); Myrick was laid off because of his prominent position in the IAM (*supra*, p. 55); McDonald was laid off because of his express preference for the IAM and express

opposition to the Teamsters (*supra*, p. 56); and Schott was demoted because, as expressed by the foreman, "You have got the wrong button," referring to her IAM membership button (*supra*, p. 54).

The thread which binds the whole of respondents unfair labor practices, of which the acts of discrimination enumerated in the preceding paragraph are a part, is the Company's opposition to the IAM and preference for the Teamsters. The Board's inquiry into this course of conduct was initiated by a charge filed on September 20, 1948 (R. 1-4). This charge specified particular acts of favoritism for the IAM, including the charge that the Company (R. 1-2):

Threatened to cause or secure the discharge of employees if they did not join said Teamster locals.

The charge also alleged acts of discrimination against 3 employees based on their IAM activity (R. 2). Relief requested in the charge, and thereby inferentially establishing the character of the wrongs claimed against the Company, included an order that "the Company stop discriminating against its employees in order to encourage or discourage membership in any labor organization" (R. 2). Another charge was filed on March 15, 1949 (G. C. Exh. 1-K), alleging in part that:

* * * at various times since on or about September 14, 1948, the * * * company * * * [has] discriminated against the persons [named employees] listed on Exhibit "B," * * * in violation of Section 8 (a) (1) and (3) of the Act, by discharging said persons after

they were reinstated after the date of September 14, 1948, because each of them engaged in concerted activity, and each was a member of Local Lodge 751 [IAM] * * *

The four acts of discrimination which the Company claims are unsupported by a timely charge are thus in the same class as those specified in the charges just summarized and are in furtherance of the objective maintained by the Company throughout, namely, to further the activity of the Teamsters and to hinder that of the IAM. The only difference is that the acts to which exception is taken took place after the filing of these charges. We submit that this makes no difference and that no new charge need be filed in order to enable the Board to investigate, adjudicate and redress unfair labor practices occurring after the filing of a charge which are fairly related to unfair labor practices already supported by a timely charge.

Before the amendment of the Act, it was settled that the Board was empowered to redress "unfair labor practices which are related to those alleged in the charge and which grew out of them while the proceeding is pending before the Board." *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 369. Further elaborating this principle, the Supreme Court stated (*ibid.*):

The violations alleged in the complaint and found by the Board were but a prolongation of the [previous offenses]. All are of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects. The Board's jurisdiction having been invoked to deal with the first steps,

it had authority to deal with those which followed as a consequence of those already taken. We think * * * "the Board was within its power in treating the whole sequence as one."

Nothing in the six-month limitations proviso to Section 10 (b) changes this settled practice.²³ The function of the charge still is "merely to provide the spark which starts the machinery of the Act running." *Cusano v. N. L. R. B.*, 190 F. 2d 898, 903, n. 8 (C. A. 3).²⁴ The Act still must be "liberally construed to give the Board wide leeway for prosecuting offenses unearthed by its investigatory machinery, set in motion by the original charge," *N. L. R. B. v. Gaynor News Co.*, 197 F. 2d 719, 721 (C. A. 2), certiorari granted, 345 U. S. 902.²⁵ This Court has recently

²³ See *N. L. R. B. v. Somerset Classics, Inc.*, 193 F. 2d 613, 615 (C. A. 2), certiorari denied, 344 U. S. 816; cf. *Superior Engraving Co. v. N. L. R. B.*, 183 F. 2d 783, 791 (C. A. 7), certiorari denied, 340 U. S. 930.

²⁴ Accord: *N. L. R. B. v. Kingston Cake Co.*, 191 F. 2d 563, 567 (C. A. 3); *N. L. R. B. v. Kobritz*, 193 F. 2d 8, 14-16 (C. A. 1); *N. L. R. B. v. Westex Boot & Shoe Co.*, 190 F. 2d 12, 13 (C. A. 5); *N. L. R. B. v. Bradley Washfountain Co.*, 192 F. 2d 144, 149 (C. A. 7); *N. L. R. B. v. Globe Wireless Ltd.*, 193 F. 2d 748, 752 (C. A. 9); *Kansas Milling Co. v. N. L. R. B.*, 185 F. 2d 413, 415 (C. A. 10); *N. L. R. B. v. Gaynor News Co.*, 197 F. 2d 719, 721-722 (C. A. 2), certiorari granted, 345 U. S. 902.

²⁵ As the Board has explained (*Cathey Lumber Co.*, 86 N. L. R. B. 157, 163):

"Were we to require that each unfair labor practice to be litigated be made the subject matter of a charge, which may be filed only by a private party, we would be leaving to private parties the complete responsibility for ferreting out violations of the Act, and determining what conduct constitutes violations. Such a course of action would emasculate the Board's long recognized investigatory power and would put the onus of investigation on

recognized the continuing vitality of these principles. *N. L. R. B. v. Martin*, 207 F. 2d 655, 656-657.²⁶ Accordingly, to say that when a charge has once been filed, and unfair labor practices nevertheless continue, the "spark" must be reapplied to empower the Board to deal with the after conduct, is to truncate the efficacy of the Act's processes to investigate and redress a single sequence of conduct.

Nor is there anything in the policy of repose to justify this enfeeblement. An offender against whom a charge has been filed can hardly claim that he has not been put on notice to preserve his evidence of what follows as well as of what precedes. Neither can he claim that there has been a failure of diligence in prosecution which has lulled him into a sense of security which should not be disturbed. Hence, as before the amendment to the Act, so now, the Board is empowered to deal with actions taken after a charge has been filed which are reasonably related to the offense theretofore claimed.

The validity of this principle has been squarely affirmed by the Courts of Appeals for the Third Circuit(*N. L. R. B. v. Epstein*, 203 F. 2d 482, 485, certiorari applied for by respondent) and the Fifth Circuit(*N. L. R. B. v. Harris*, 200 F. 2d 656, 658; *N. L. R. B. v. United States Gypsum Co.*, 206 F. 2d 410, 412, certiorari applied for by respondent). In *Epstein*, the Third Circuit stated, *supra*:

private parties, a situation hardly consistent with the public nature of the Act and the agency created to administer it."

²⁶ See also, *Katz v. N. L. R. B.*, 196 F. 2d 411, 415 (C. A. 9); *N. L. R. B. v. Globe Wireless Ltd.*, 193 F. 2d 748, 752 (C. A. 9).

* * * we think that the complaint in this case could have properly included the matters occurring subsequent to the filing of the charge, for the original charge was of a continuing violation and the subsequent acts were of the same class and were continuations of it and in pursuance of the same objects.

In *Harris*, the Fifth Circuit stated, *supra*:

Respondent makes no point that the violations found beginning February 16, 1950, all occurred subsequent to the filing of the last amended charge on February 14, 1950, but we make note of that fact for the purpose of considering whether the Board had jurisdiction to consider violations subsequent to the filing of the charge but prior to the issuance of the complaint. Clearly, we think there was such jurisdiction. The charge was of a continuing violation, a refusal to bargain on February 7, 1950, and "at all times since." The charge having set in motion the Board's inquiry, the complaint properly included matters occurring subsequent to the filing of the charge, and the issue respondent was called on to meet was the truth of the accusations in the complaint.

In *United States Gypsum, supra*, a charge was filed on April 25, 1949, specifying *inter alia* that an employee named Peoples was discriminatorily discharged on February 6, 1949 (206 F. 2d at 412). The Board found that his discharge in February was not discriminatory but that the failure to recall him to work in May or June, 1949 was (206 F. 2d at 413-414; 94 N. L. R. B. 112, 133). Although the discriminatory refusal to recall occurred subsequent to the filing of

the last timely charge, that charge was held to be an adequate predicate for the complaint alleging the failure to recall as a discriminatory act (206 F. 2d at 412).

Application of the principle illustrated by these cases is dispositive of the Company's contention here. The discriminatory acts committed subsequent to the filing of the September 1948 and March 1949 charges, while the whole course of the Company's conduct was before the Board for full inquiry, were of the same character as those charged and were in furtherance of the same program to promote the Teamsters and to defeat the IAM. The Board's authority to deal with the "first steps" having been timely invoked, it was wholly proper for the Board "to deal with those which followed" (*National Licorice* case, *supra*, pp. 67-68).

The Company mistakes the issue when it states that a discriminatory act is not a "continuing violation" but that the offense is completed when the act of discrimination occurs (Co. Br., p. 74). The question is not whether one discriminatory act has a continuing character or is a completed offense when done. The question is whether several discriminatory acts are so related to the same factual picture that it may be said that those occurring after the charge is filed are manifestations of the same practices in which the charge sounds. Is the conduct before and after the charge in its totality part of the same pattern? If it is, as it is here, the complaint alleging the subsequent acts is adequately supported by the prior charge.

* * * we think that the complaint in this case could have properly included the matters occurring subsequent to the filing of the charge, for the original charge was of a continuing violation and the subsequent acts were of the same class and were continuations of it and in pursuance of the same objects.

In *Harris*, the Fifth Circuit stated, *supra*:

Respondent makes no point that the violations found beginning February 16, 1950, all occurred subsequent to the filing of the last amended charge on February 14, 1950, but we make note of that fact for the purpose of considering whether the Board had jurisdiction to consider violations subsequent to the filing of the charge but prior to the issuance of the complaint. Clearly, we think there was such jurisdiction. The charge was of a continuing violation, a refusal to bargain on February 7, 1950, and "at all times since." The charge having set in motion the Board's inquiry, the complaint properly included matters occurring subsequent to the filing of the charge, and the issue respondent was called on to meet was the truth of the accusations in the complaint.

In *United States Gypsum*, *supra*, a charge was filed on April 25, 1949, specifying *inter alia* that an employee named Peoples was discriminatorily discharged on February 6, 1949 (206 F. 2d at 412). The Board found that his discharge in February was not discriminatory but that the failure to recall him to work in May or June, 1949 was (206 F. 2d at 413-414; 94 N. L. R. B. 112, 133). Although the discriminatory refusal to recall occurred subsequent to the filing of

the last timely charge, that charge was held to be an adequate predicate for the complaint alleging the failure to recall as a discriminatory act (206 F. 2d at 412).

Application of the principle illustrated by these cases is dispositive of the Company's contention here. The discriminatory acts committed subsequent to the filing of the September 1948 and March 1949 charges, while the whole course of the Company's conduct was before the Board for full inquiry, were of the same character as those charged and were in furtherance of the same program to promote the Teamsters and to defeat the IAM. The Board's authority to deal with the "first steps" having been timely invoked, it was wholly proper for the Board "to deal with those which followed" (*National Licorice* case, *supra*, pp. 67-68).

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VI. The Board's order requiring the Company to cease and desist from "in any other manner interfering with, restraining, or coercing its employees in the exercise" of their guaranteed rights is a proper exercise of the Board's discretion in formulating a remedy

The Board's order, in addition to enjoining the particular unfair labor practices found, required the Company to cease and desist from "In any other manner interfering with, restraining, or coercing its employees in the exercise" of the rights guaranteed them by Section 7 of the Act (R. 286). Explaining the reasons for this order, the Board stated that (R. 283-284):

The Trial Examiner recommended that the [Company] cease and desist from the unfair labor practices found and from any like or related conduct. However, the [Company's] illegal activities, including interference, restraint, and coercion, unlawful assistance and support to Teamster Local 451, and discrimination against various of its employees, go to the very heart of the Act and indicate a purpose to defeat self-organization of its employees. We are convinced that the unfair labor practices committed by the [Company] are potentially related to other unfair labor practices proscribed by the Act, and that the danger of their commission in the future is to be anticipated from the [Company's] conduct in the past. The preventive purpose of the Act will be thwarted unless our order is coextensive with the threat. Accordingly, in order to make effective the interdependent guarantees of Section 7 and thus effectuate the policies of the Act, we shall order the [Company] to cease and desist from

in any manner infringing upon the rights of employees guaranteed by the Act.

Contesting the scope of the order, the Company claims that the unfair labor practices found do not support this evaluation of their import and fail to sustain the breadth of the order entered (Co. Br., pp. 75-80).

There is no question concerning the power of the Board to enter an order of this scope. *N. L. R. B. v. Cheney California Lumber Co.*, 327 U. S. 385. Power admitted, the sole question is as to the appropriateness of its exercise, and the test on judicial review is that an order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *N. L. R. B. v. Seven-Up Bottling Co.*, 344 U. S. 344, 346-347. Based on the Board's findings, the order is well within the principle that "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed in the past or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426, 437. The numerous acts of discrimination alone suffice to support its breadth, for "a discriminatory discharge of an employee because of his union affiliations goes to the very heart of the Act." *N. L. R. B. v. Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C. A. 4). This aside, the Company has engaged in the "general comprehensive offense" of interference, restraint, coercion and assistance, "and the order may be as broad as the offense." Judge (now Mr. Justice)

Minton in *N. L. R. B. v. Sunbeam Electric Mfg. Co.*, 133 F. 2d 856, 862 (C. A. 7). And these unfair labor practices, committed as part of the Company's promotion of the Teamsters in default of its obligation of neutrality, readily support the Board's determination that the Company had "an attitude of opposition to the purposes of the Act to protect the rights of employees generally * * *" *May Department Stores Co. v. N. L. R. B.*, 326 U. S. 376, 393. If the gamut of unfair labor practices in this case is not an adequate basis for the Board's judgment that a broad order is necessary, it is difficult to know how egregious unfair labor practices must be before they are sufficiently so to warrant the conclusion that the order "in broad terms" is "essential to accomplish the purposes of the Act." *Id.*, at 391.

The Company places principal reliance on the trial examiner's view that a broad order was unnecessary (Co. Br., pp. 77, 79-80). We put aside the fact that the Board reversed the examiner in many respects (*supra*, pp. 12, 15, 30, 48), so that the scope of the unfair labor practices considered by the Board was wider than that before the examiner. The heart of the matter is that "the relation of remedy to policy is peculiarly a matter for administrative competence" (*Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 194), and the competence which the statute exacts is the undiluted judgment of the agency heads. In the field of remedy the examiner's views contrary to those of the Board carry no detractive weight. "Conclusions, interpretations, law, and policy should, of course, be open to full review" by the Board uncontrolled by the exam-

iner's recommendations. *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 494, quoting from Final Report, Atty. Gen. Comm. Ad. Proc., p. 51.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition to set aside the Board's order should be denied and that the Board's petition for enforcement of its order should be granted in full.

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JANUARY 1954.

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Petitioner,

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Respondent.

**PETITIONER'S REPLY BRIEF TO
INTERVENORS PEPIN AND PIOLI**

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FEB 16 1954

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I. CONCERNING BRIEF OF INTERVENOR PEPIN

Additional Statement of Facts

Following the strike, Joseph A. Pepin returned to work to his former job as a timekeeper (R. 1784). Approximately one year later on October 28, 1949, he was laid off¹, his termination slip being marked

¹Pepin was laid off, not discharged, as erroneously stated in several instances in Pepin's brief, see, e. g., pp. 4 and 5.

“laid off—reduction in working force” (R. 1784; Gen. C. Ex. 159). Pepin first indicated a desire for re-employment on June 13, 1950, when, pursuant to the terms of the collective bargaining agreement which became effective on May 22, 1950 (Resp. Ex. 57), he registered his availability for recall² (R. 1789, 3887). Pepin testified that he registered once more (R. 1789) (presumably three months thereafter), but he did not maintain his registration (R. 3887). At the time of the hearing, there were 21 individuals on layoff status from Job No. 4496, Pepin’s job classification (R. 3886-3887).

Pepin’s supervisor, Chief Timekeeper Morrell, testified that he had a surplus of timekeepers during the period when Pepin and approximately 10 or 12 other timekeepers (including Alfred Bass, a complainant, who was laid off October 21, 1949, and with respect to whom the complaint was dismissed by the Board (R. 168, 215)) were laid off (R. 2702, 2708). Morrell also testified that Pepin did not work the overtime at the beginning of the shift to Morrell’s satisfaction, resulting in the withdrawal of this work in January, 1948 (R. 4441-4443, 2705-2706).

The Trial Examiner summarized his findings with respect to Pepin’s layoff as follows:

“I credit the testimony of Lynn Morrell con-

²Such registration was required every three months in order to maintain seniority (R. 1789).

cerning the layoff of Joseph Pepin. I also believe, as Morrell testified, that Pepin did not work the overtime at the beginning of his shift to Morrell's satisfaction. I find no unlawful discrimination in the layoff or failure to re-hire" (R. 217).

The Examiner's findings were adopted by the Board and the complaint was dismissed with respect to Pepin (R. 270).

Layoff of Pepin Proper

The main thesis of Pepin's brief is that Morrell's testimony respecting Pepin's layoff is "not entitled to credence" (P. & P. Br. 4). Thus, this Court is asked to review and set aside the Trial Examiner's credibility finding which was accepted by the Board. It is well established that appellate courts do not normally undertake to resolve questions of credibility. *National Labor Relations Bd. v. Anderson*, 9 Cir., 206 F. 2d 409.

The extremely narrow standard of judicial review applicable to cases where the Board has accepted the Trial Examiner's findings based on the evaluation of oral testimony as reliable, as in this case, was summarized by the court in *National Labor Relations Bd. v. Dinion Coil Co.*, 2 Cir., 201 F. 2d 484, 490, as follows:

"* * * we surely may not upset the Board *when it accepts a finding of an Examiner* which is grounded upon (a) his disbelief in an orally

testifying witness' testimony because of the witness' demeanor or (b) the Examiner's evaluation of oral testimony as reliable, unless on its face it is hopelessly incredible * * * or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony * * *." (Emphasis supplied)

Nothing in the record meets this standard.

In an effort to discredit Morrell's testimony as to Pepin's layoff, Pepin's counsel refers to the fact that Morrell's testimony as to Gerber's discharge was not credited by the Board, apparently relying on the fallacious principle "false in one, false in all"³ (P. & P. Br. 4). Apart from the fact that the Board's failure to credit Morrell's testimony as to Gerber was, as we contend elsewhere,⁴ erroneous, we submit that what the Board concluded in Gerber's case is irrelevant here. Counsel apparently overlooks⁵ the fact that the Examiner *credited* Morrell in Gerber's case (R. 204), as he did in Pepin's case. The fact that the Board reversed the Examiner's crediting of Morrell in one case and not in the other cuts both ways. It is just as logical to urge that this disparity strengthens the force of Morrell's testimony as to Pepin as to urge the opposite.

³This "worthless" principle has "little or no place in modern jurisprudence." *Virginian Ry. Co. v. Armentrout*, 4 Cir., 166 F. 2d 400, 405; annotated 4 A. L. R. 2d 1064; 2 Wigmore on Evidence (2d Ed.), §1008, p. 449.

⁴(Co. Br. 38-42).

⁵In his zeal to discredit Morrell, Pepin's counsel twice erroneously states that Morrell's testimony respecting Gerber's discharge was *discredited* by the Examiner (P. & P. Br. 5, 16).

The Examiner had the opportunity of observing Pepin on the witness stand and of judging the validity of Morrell's testimony to the effect that Pepin was difficult to deal with and was always doing only that amount of work which the rules called for and no more (R. 2706). Pepin's personality and demeanor may well have been the deciding factors in the Examiner's mind, which the words do not preserve, convincing him of the non-discriminatory selection of Pepin for layoff. In support of the demeanor evidence, see, for example, Pepin's testimony with reference to time cards that the number of times he punched in less than six minutes before shift was five (R. 4382) and the subsequent stipulation that the correct number was twelve (R. 4442). Note also the adroit refinement as to Company rules regarding gambling and playing cards (R. 4387-4388).

It is argued that other events involving Pepin, related in the record, occurred long before the strike and, therefore, that these could not be anything more than afterthoughts or attempts to rationalize the layoff. They do, however, enter into making a total picture culminating in the irritation Morrell found regarding Pepin's refusal to conform to the spirit of the six-minute pre-shift overtime work (R. 4443).

Regardless of whether or not the Court does re-

verse the Board with respect to Gerber's case, indisputably, where the Examiner and Board agree as to the credibility findings, there is nothing in this record which would justify this Court departing from its usual position that it will not normally resolve questions of credibility.

II. CONCERNING BRIEF OF INTERVENOR PIOLI

Additional Statement of Facts

Pioli on direct examination was asked:

"Q. Now, did you happen to know what incidents led to your discharge for improper conduct as stated on this slip?

"A. The immediate incident?

"Q. Yes.

"A. Well, it was profanity. I called Mr. Hyman a damned liar." (R. 504).

Later, on rebuttal, Pioli said:

"Q. So the record may be clear, you admitted what?

"A. I admitted I called Mr. Hyman a 'god damn liar'." (R. 4309).

Pioli was discharged November 11, 1948. On the following day, he filed a written statement in applying for unemployment compensation as follows:

"He came at me like a bull in a china shop. His belligerent attitude caused me to hastily call him a liar. I then showed him my temporary assignment card to prove it." (R. 4320).

Further relating the sequence of events, Pioli testified that upon return to his shop 702 (R. 505) he learned from his squad leader that Hyman had been

checking on his whereabouts. At this moment Hyman was standing at the shop office "the bull pen" (R. 4322), a distance about 100 feet away. Pioli proceeded to this office and *opened* the conversation (R. 4322).

Hyman, Assistant Superintendent, testified that the morning of the Pioli incident he was asked by the general foreman of Pioli's shop to come up and take care of the shop for him. Within a few minutes he received a call from an assistant to the Department Superintendent who told him that Pioli was down in shop 102 "with a group of people around there, waving his arms, talking; apparently organizing" (R. 3359). Hyman then investigated, inquiring of Pioli's squad leader, Anderson, asking him what reason Pioli had for being down there, and Anderson replied he did not know. Thereupon, Hyman asked the clerk if anyone had given Pioli permission and was informed that Pioli had a "* * * pass to go to 102. So I dropped the matter" (R. 3359). When Pioli returned he learned from his squad leader, Anderson, that Hyman was "having quite a steam pressure, and that he was accusing me of having gone down into 102 for the purpose of organizing" (R. 505-506). Hyman was standing with his arms over the office rail when Pioli came

over and the conversation in question took place (R. 3359).

The Discharge was Proper

Counsel for Pioli accepts the Board's crediting of Pioli's version of the incident and asserts only that the conclusions of law are patently wrong. Taking the testimony of Pioli at face value, we have his frank admission that he grossly insulted Hyman. Pioli did not contend that the *charge* was false but that *Hyman* was a liar. This was personalized profanity directed to high level plant supervision.

Pioli was the aggressor who left his work station and walked a distance of 100 feet to open the conversation. Therefore, the Board is unquestionably right in finding that the situation was not "contrived" (R. 199, 270).¹ As it further appears Hyman had been advised by another supervisor that Pioli was out of his regular shop "apparently organizing," it was incumbent upon Hyman at least to investigate whether Pioli had permission to be away from his work station. Upon ascertaining that Pioli did have a pass, he dropped the matter. Here again, the observation that "Hyman's suspicion that Pioli was absent from his department on union

¹The Board accepted the Examiner's findings and recommendations as to Pioli.

business, though mistaken, was not entirely unreasonable" (R. 199) is manifestly right.

Pioli's counsel endeavors to discount the profanity as the real reason by quoting from Hyman's testimony (P. & P. Br. 21). However, the immediately following sentence is,

"However, to call a man a liar, I would have my fighting clothes on." (R. 3362).

In summary, we have a worker as the aggressor leaving his work station, proceeding to the shop office, confronting his supervisor by opening the conversation and, in the course thereof, calling him "a god-damned liar."

The mere fact that Pioli was a prominent union official does not constitute a license for the disrespectful conduct here involved. Even assuming the accusation concerning organizing on Company time (not a protected, concerted activity in this instance) was made by Hyman, nonetheless, it is apparent that Pioli was not intentionally provoked to create a cause for discharge. The insubordination is a valid non-discriminatory cause for discharge, and, upon the record considered as a whole, no other inference is possible.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions of intervenors Pepin and Pioli to set aside the Board's order should be denied and

the decision dismissing the complaint as to intervenors should be affirmed.

Respectfully submitted,

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PETITIONER'S REPLY BRIEF

We shall not attempt either to repeat or restate the arguments set forth in our opening brief. We deal only with new arguments advanced on behalf of the Board and with the specific matters in its brief which seem in most urgent need of correction.

I. Erroneous Premise

The erroneous premise which pervades the Board's brief is the baseless contention that all of

the Company's acts here in question were in furtherance of a "program to promote the Teamsters and to defeat the IAM" (Bd. Br. 71). It is said that this motivation is evident throughout and is the "thread which binds the whole of respondent's unfair labor practices" (Bd. Br. 66). Typical of this emphasis is the assertion, regarding the alleged discrimination against individuals, that "* * * the Company, through several of its supervisors, utilized numerous opportunities to show its disfavor of the IAM by discriminating against its members in the matter of discharge, discipline, layoffs, and recalls" (Bd. Br. 15-16). In brief, counsel for the Board urges that this supposed motivation strengthens and renders reasonable the inferences drawn by the Board in finding the several unfair practices, and that each of them should be viewed "in the context of the Company's hostility to the IAM and partiality for the Teamsters * * *" (Bd. Br. 51). Incontestably, the Board did not thus predicate its conclusions with respect to the several individual cases, and its counsel may not now urge such a theory.

In fact, the Board's decision with respect to as-

¹Other expressions of this erroneous premise are: The Company "hoped for the displacement of the IAM by the new Teamsters local" (Bd. Br. 3); the Teamsters local had "the encouragement and cooperation of the Company" in its organizational drive (Bd. Br. 2); "* * * the Company's whole pattern of preference for the Teamsters to which these incidents are related" (Bd. Br. 37); "* * * furtherance of the objective maintained by the Company throughout, namely, to further the activity of the Teamsters and to hinder that of the IAM" (Bd. Br. 67).

sistance and support of the Teamsters² rests upon very narrow grounds, namely: (1) a preference given "for a time" (R. 219) to employment applicants having Teamster referrals—based on five instances (the last of which occurred in February, 1949) (R. 219); (2) the refusal to permit Klein to cancel his Teamster dues deduction authorization (R. 219); (3) the denial of Carrig's promotion to a supervisory position, because of Teamster opposition (R. 219), and (4) Gerber's discharge, for inducing Teamsters to cancel their dues deduction authorizations (R. 276-277).

These isolated, unrelated events simply do not support counsel's assertion throughout the brief that the Company had a fixed objective to further the Teamsters and to hinder the IAM.

The erroneous premise upon which the Board's brief is based wholly ignores and is in direct conflict with six very significant facts found by the Board, namely:

- (1) *No general policy* of discrimination against Lodge 751 members or strikers existed (R. 214)³,
- (2) Boeing did not at any time dominate the Teamsters (R. 220),

²The Board adopted (R. 270) the Trial Examiner's findings and conclusions on this issue (R. 218-220) without change or comment, adding, however, the conclusion that Gerber's discharge also constituted assistance and support (R. 277).

³This, despite the contrary position of General Counsel throughout the hearing that while there was no disposition on the part of individual supervisors to discriminate, it was the broad policy of the Company to discriminate in favor of the Teamsters and against Lodge 751 (R. 2280).

(3) Permitting Teamster organizers in the plant during the strike did not constitute unlawful support of the Teamsters, particularly since Lodge 751 did not seek similar permission (R. 218),

(4) None of Boeing's acts during the strike were unlawful (R. 218-219),

(5) Following the strike, Lodge 751 and the Teamsters were accorded equal organizational opportunities (R. 218-219), and

(6) Use of the Teamsters in recruiting employees did not constitute unlawful support (R. 219).

Counsel for the Board does not contend that these significant findings are not supported by the record. In fact, it is plain that they are. For example, in finding that there was no general policy of discrimination, the Examiner noted (R. 214) that more than 5,000 layoffs took place during the period involved in this case (Resp. Ex. 38, R. 2258; Gen. C. Ex. 213). In 2,200 instances those laid off were members of Lodge 751, and in 1,200 cases they had been strikers (R. 214; Resp. Ex. 38, R. 2258; Resp. Ex. 39, R. 2260). As the Examiner observed, "* * * this report is concerned with only a small fraction of the number of employees laid off following the end of the strike and this circumstance must be accorded weight." (R. 198). Only 4 of these layoffs are before this Court.

It is equally significant that during the period

from the end of the strike to March 31, 1951, 1,510 persons were discharged for cause, 521 of whom were strikers (Resp. Ex. 39, item 2, R. 2260). Thirty-three of these discharges, all involving persons who participated in the strike and, with one exception, who were members of Lodge 751, were in issue before the Board.⁴ If the all-pervading discriminatory motivation suggested by Board's counsel actually were present here, it is indeed surprising that only four of these discharges were found unlawful by the Board.

The record is likewise clear that the Company did not solicit or inaugurate the entry of the Teamster local (R. 2081-2089, 2926-2928), as was the case in *National Labor Relations Bd. v. Ronney & Sons Furniture Mfg. Co.*, 9 Cir., 206 F. 2d 730.

During the strike Lodge 751 did not request permission that its representatives be permitted on Company premises (R. 218, 2327). From the end of the strike until October 14, 1949 (Resp. Ex. 54, R. 2320), when, shortly before the representation election, the Company brought the year-long organizational campaigns to a close, the rival unions were accorded equal organizational opportunities (R. 2307-2308; Resp. Ex. 45 through 53, inclusive, R. 2311-2318). On October 20, 1949, Harold Gibson,

⁴Twelve more were considered by the Examiner but General Counsel did not except to his holding these discharges lawful (R. 228-258).

president of Lodge 751, said, "We feel that our organizers were treated fairly" (Resp. Ex. 59, R. 2365).

Further in support of the Board's finding that there was no broad Company policy of discrimination are the speeches, letters, and memoranda of the Company president, Allen, and other top management representatives (R. 2272-2302). Representative of this Company attitude is the letter dated September 23, 1948 (Resp. Ex. 42, R. 2276), ten days after the end of the strike, by Mr. Allen to all employees, in part, as follows:

"You can be assured that I do not have any bitter feeling or vindictiveness by reason of what has occurred during the past few months.
* * * Regardless of employee affiliation, it is *my determined purpose that every employee at Boeing receive friendly and impartial consideration from Boeing management.*" (Emphasis supplied)

Several months later on February 28, 1949, Mr. Allen, in a memorandum to division heads⁵ (Resp. Ex. 43, R. 2285), which automatically became Company policy (R. 2284), said:

"The company did not participate in the A. F. of L. union decision to organize our employees. It is our understanding that this decision was based upon a petition to do so signed by more than 2,000 employees. Local 451 is in no way beholden to the company, nor the company to 451. We did welcome the entry of the

⁵This memorandum is a part of the evidence relied on by Board's counsel in establishing the underlying premise. It is, however, meagerly quoted. In context it shows a high degree of impartiality.

A. F. of L. union into the picture because we hoped that it would give us an opportunity to build a sound employee-management relationship. However, *when the strike ended and members of 751 re-entered the plant it immediately became our policy to meet all requirements of the law as to impartiality between unions when there is more than one union involved.*" (Emphasis supplied)

The Trial Examiner, commenting on the admissibility of these documents, after the hearing had been in progress one and one half months, noted that the General Counsel's case was that, while there was no disposition on the part of the individual supervisor to discriminate in any way against an employee working under his direction, the wishes of the individual supervisor were not of any moment whatsoever because of the existence of a "broad policy of the Company to discriminate in favor of 451 and against 751" (R. 2280). However, counsel failed in his efforts to convince the Board that any such broad policy ever existed.

If an employer were to embark upon a course of discrimination designed to displace a union, he would normally select as the persons to be downgraded, laid off or discharged the outstanding or prominent union members or leaders. These would be the normal targets for discrimination. In a case of this scope, if any such policy as counsel for the Board contends did exist, we would expect to find prominent union members singled out for disparate

treatment. The fact is that the Board found discrimination against only two⁶ out of the total of 221 prominent union members (officer or member of a committee) rehired following the strike (Resp. Ex. 40, R. 2263). This again refutes an underlying motivation of discrimination.

II. The Rules—Lodge 751 Streamers and Committeeman Badges.

Isolated or casual remarks of some supervisory employees not authorized by Boeing and not containing coercion are not interferences. *Martel Mills Corp. v. National Labor Relations Bd.*, 4 Cir., 114 F. 2d 624; *National Labor Relations Bd. v. Fairmont Creamery*, 10 Cir., 144 F. 2d 128; *National Labor Relations Bd. v. West Ohio Gas*, 6 Cir., 172 F. 2d 685; *National Labor Relations Bd. v. Superior Co.*, 6 Cir., 199 F. 2d 39.

Both sides take comfort on this issue from the *Republic Aviation* case, 324 U. S. 793. We urge that two facts distinguish that case from the present case, namely: (1) two strong unions were engaged in a representation contest within the plant, and (2) violence was imminent because of the bitterness engendered by the strike. Neither of these facts existed in the *Republic Aviation* case, but the Su-

⁶Burrell and Myrick (Resp. Ex. 41, R. 2263).

preme Court there recognized their relevance and importance as distinguishing factors (Co. Br. 23-24).

Board counsel contends that the presence of two unions "cannot be transformed into the sole reason for invalidating [*sic*—validating?] the rule" prohibiting the wearing of committeeman badges (Bd. Br. 40). We contend that the presence of two unions in the plant is of material importance. Under these circumstances the duty devolving upon an employer is that "He must maintain a strictly neutral attitude. Especially is this so where the adherence of the employees is being sought by rival labor organizations." *Harrison Sheet Steel Co. v. National Labor Relations Bd.*, 7 Cir., 194 F. 2d 407, 410.

Counsel for the Board advances several reasons why the committeeman badges "could hardly mislead any employee" (Bd. Br. 40). First, it is said that the Company "widely advertised that the IAM had lost its representative status by authorizing the strike" (Bd. Br. 40). This was the Company's legal position. However, as of the end of the strike, September 13, 1948, when these rules were placed in effect, and for more than eight months thereafter, this legal question was not free from doubt.⁷

⁷Lodge 751 maintained that it had not lost its status and the Trial Examiner's Intermediate Report and Recommended Order, issued July 20, 1948, in the prior unfair labor practice proceeding instituted by Lodge 751 had then been issued, finding that Lodge 751 had not lost its status and recommending that the Company be ordered to bargain with it. (Board's Decision and Order, to the same effect, issued November 22, 1948 (80 NLRB No. 88); set aside in *Boeing Airplane Co. v. National Labor Relations Bd.*, D. C. Cir., 174 F. 2d 988, decided May 31, 1949).

Counsel also makes the bald assertion, contrary to the facts, that after the strike it was no secret that the Company favored the Teamsters (Bd. Br. 40).

Finally, it is said the employees knew that a representation election had been scheduled (Bd. Br. 40). This is not true. The order directing an election was not issued until October 4, 1949, more than a year after the rules were put into effect, and the representation petition was not even filed until June 2, 1949 (Resp. Ex. 81, R. 3885).

With respect to the streamers, it is urged that they expressed nothing more than an ordinary union button would imply and, therefore, that they could not be a provocation to disorder (Bd. Br. 44). Apparently the union believed the streamers carried added significance because they were printed and worn in addition to the ordinary membership buttons. The union said that, in addition to the buttons, all returning strikers "proudly are displaying" a little ribbon that announces "I am loyal to Aero Mechanics Union" (Resp. Ex. 69, R. 2434, Col. 1).

It is also urged that because Boeing permitted organizers to contact workers — assertedly more productive of clashes than wearing insignia (R. 271)—the streamers should have been permitted (Bd. Br. 44). Suffice it to say that to permit organizers access was reasonably believed by Boeing to

be the most enlightened course to guarantee employees freedom of choice in making up their own minds with the least loss of production. It was either this or "soap box" and "chaotic conditions" (R. 2309). Very strict ground rules applicable to representatives of both unions were promulgated (Gen. C. Ex. 31). Among other things, they provided that representatives were immediately to withdraw from any altercation or disturbance. If this or any other rule was violated, the privilege of admission to the plant was to be withdrawn.

III. The Discharges, Layoffs and Demotions

Gerber's Discharge

Gerber was discharged on December 7, 1948. He sought and obtained a review of his discharge by a review committee. The committee's minutes (R. 2723-2724) show that Gerber was interviewed and that he denied approaching any employees regarding union membership on Company time. They also record that in view of the conflict between Gerber's and Morrell's version the committee instructed Rig[s]by, a committee member, to interview some of the employees (R. 2724). Rig[s]by did so on December 16th and his written report of the interviews states (R. 2726):

"All four of the employees stated very positively that they had been approached by Arthur Gerber on company time, and asked to sign up

for Local 751. Philip Gibson stated further that Mr. Gerber told him that if he did not join 751, he would be out of a job in 30 days."

Gerber testified that later, on December 20th, he telephoned Evan Nelsen, another committee member, to learn the results of the review committee hearing and was told the matter had been referred back to Morrell. His call was switched to Morrell who informed him that the committee had sustained the discharge (R. 859-860).

In this setting, Morrell's testimony set out in the Board's brief, p. 60, becomes clear. The particular question and answer which Board counsel claims devastates Morrell is:

"Q. And how soon after getting the statements did you terminate Gerber?

"A. Oh, I would say within 2 or 3 days, approximately."

Obviously, Morrell could have meant either the action he took on December 7th after securing oral statements (R. 2713) or, with equal plausibility, his reporting to Gerber the committee's action on December 20th sustaining his discharge on the basis of written statements obtained by others on December 16th.

The disposition of Gerber's case does not hinge exclusively on Morrell's testimony, because as the minutes show, the review committee's principal inquiry was (R. 2723-2724):

"Mr. Gerber was interviewed, and he denied approaching any employee regarding union membership on company time.

"Morrell was then called in, and he stated that he had talked to several employees who said they had been approached."

Likewise, according to Huleen to whom Gerber later appealed, the primary fact which his investigation confirmed was that Gerber "had been actively organizing on company time" (R. 2718), which Gerber denied (R. 2721).

The Board finds that the real reason for Gerber's discharge was his article in the union newspaper (Gen. C. Ex. 69, R. 866), resulting in a notable increase in cancellation of Teamster dues. The record is silent that management had any knowledge that Gerber was the author of the questioned article nor is there any evidence that the Company, prior to his discharge, was aware of any "notable cancellations" (if 10 cancellations (R. 2719) may be so labeled). On the other hand, the record is clear that the review committee was concerned primarily with whether or not Gerber improperly solicited union membership during working time.

Gerber's testimony, describing his success as an author and his development of a union prepared and distributed dues cancellation card as being the reason for his dismissal, appears unduly magnified in view of his own contrary appraisal of his activities in his letter of January 4, 1949, to Mr. Allen,

president of Boeing (Gen. C. Ex. 71, R. 872). In this letter, as a part of his plea for reinstatement, he writes, "In addition, I have never run for any union office nor been active in union affairs."

If, as urged in our opening brief, the credibility findings of the Examiner must be honored by the Board, the testimony of Gerber is that of a discredited witness. The documentary evidence relied upon by the Board does not in any way impeach, but rather confirms, the testimony of Morrell and the reasonableness thereof.

McDonald's Layoff

In an effort to sustain the Board's decision, counsel relates McDonald's layoff to the asserted pattern of opposition to Lodge 751 (IAM), and erroneously states that the Board found that McDonald was laid off, in part, because he expressed a "preference for the IAM" (Bd. Br. 25, 56). In fact, if McDonald expressed a preference for any union, it was the I. B. E. W. (R. 965) and the Board so found (R. 279).⁸ For the reasons set forth in our opening brief, pp. 51-54, it is clear that the Board's inference regarding McDonald is wholly unreasonable.

Schott's Demotion

⁸Presumably, McDonald's testimony regarding the I.B.E.W. is the only basis for the Board's capricious act of including the I.B.E.W. in its cease and desist order (R. 285-286). No issue involving the I.B.E.W. was ever properly before the Board (Co. Br. 53).

Board counsel erroneously implies that Schott was summarily demoted shortly after her return to work (Bd. Br. 54). Actually, Schott's employment records show that, on February 10, 1949, four months after her return, she was *promoted* (R. 1995). It was not until April 18, 1949, the month of the B-54 cancellation, that she accepted a demotion to avoid being laid off (R. 2698).⁹

Board counsel relies on Lawrence's remarks (Bd. Br. 54). Lawrence was working on a different shift and not Schott's foreman at the time (R. 2007). Counsel suggests no theory under which it reasonably can be inferred from these remarks that Schott's demotion was discriminatory and this completely ignores Heiland's function in demotions (Co. Br. 43).

Finally, counsel states that there was no explanation of why Schott, particularly, was demoted (Bd. Br. 54). There being no basis in the record for a reasonable inference of discrimination, no explanation was necessary. Nevertheless, James, who *was* Schott's foreman, explained that there was a surplus of employees necessitating the demotion of some and the layoff of others (R. 2698). The fact that Schott's nervousness affected her work (R. 2005, 2699), that she was on leave of absence from January 10 to March 11, 1949 (R. 2004), that she

⁹ 554 employees were laid off that month (Resp. Ex. 38)

was a borderline case who just managed to get by as a spot welder (R. 3090-3091), and that before the strike she was “found incapable of performing the duties of spot welder ‘A’ ” (Resp. Ex. 30, R. 3370, 2001-2003), show why Schott particularly was selected for demotion. The Board’s inference is capricious and wholly unreasonable.¹⁰

IV. Assistance and Support of Teamsters

Board counsel has dismissed as of no significance the six instances where a Teamster referral did not result in the applicant getting a job (Co. Br. 69), on the ground that these were all strikers (Bd. Br. 34). Demonstrating the illogic of this point is the fact that 8,890 *strikers* were reemployed *without Teamster referrals* (R. 2266). It thus appears there was no magic in a Teamster employment referral.

It is also contended that the Company assertion (Co. Br. 68) that Courtier and Brody were not hired when they first applied because the Company had suspended hiring to accommodate returned strikers is unbelievable in view of the 748 new applicants *hired* in September (Bd. Br. 33). However, the rec-

¹⁰As noted in our opening brief (Co. Br. 55-56), we urge that, no exception having been filed, the Board erred in finding Schott’s demotion discriminatory. In the *Salant* case (Bd. Br. 54), although the Board states it considered matters as to which no exceptions were filed, it did not reverse the Examiner with respect thereto. In the *International Rice* case (Bd. Br. 54), the scope of the exceptions does not appear from the reports and, in any event, the question as to exceptions was not passed upon by either court. Counsel’s position should not now be given judicial sanction.

ord shows that 748 (taken from Gen. C. Ex. 212) is the number of new applicants who *reported for work* during September, irrespective of when they were *hired* (R. 3921). Thus, all of them could have been hired before the end of the strike. This does not, as counsel contends, impeach the testimony as to the suspension of *hiring*.

V. Statute of Limitations

The allegations we challenge¹¹ allege four acts which occurred *after* the two charges were filed and *more than six months before* the complaint was issued. The cases previously cited¹² establish that these allegations are barred unless the four acts are very closely related to the acts asserted in the charges. The phrases most frequently used by the courts to describe how close the relationship must be are quoted in our opening brief (Co. Br. 74).¹³ In its brief the Board uses the words "fairly related" (Bd. Br. 67) and "reasonably related" (Bd. Br. 69). The question is whether the relationship is suffi-

¹¹Summarized, Co. Br. 72.

¹²Co. Br. 74-75; Bd. Br. 67-70; the Epstein and Harris cases relied on by the Board (Bd. Br. 69-70) are not in point because they involved a "continuing violation"—refusal to bargain (See Co. Br. 74-75). The United States Gypsum case discussed by the Board (Bd. Br. 70) is clearly distinguishable because a timely charge was filed as to Peoples' discharge and the subsequent failure to recall Peoples was obviously far more closely related to Peoples' discharge than any of the four acts here in question are related to any of the acts asserted in the charges.

¹³To these may be added "* * * which 'relate back' or 'define more precisely' the charges enumerated within the original and timely charge." *National Labor Relations Bd. v. Gaynor News Co.*, 2 Cir., 197 F. 2d 719, 721, affirmed by the Supreme Court 22 LW 4097 (Feb. 1, 1954).

ciently close in this case. The Board contends that it is because the "thread" of "opposition to the IAM and preference for the Teamsters" binds the whole (Bd. Br. 66), rendering the four acts in question "part of the same pattern" (Bd. Br. 71). There being no such pattern, *supra*, pp. 1-8, the four acts have no reasonable relation to those asserted in the charges.

VI. Broad Order

Although the Board may have power to enter a broad cease and desist order, it does not follow that a court must act as a mere ministerial agency to execute such an order. As observed in the concurring opinion (analyzing Section 10(e) of the Act) in *National Labor Relations Bd. v. Cheney California Lumber Company*, 327 U. S. 385, 391:

"Here the statute is not mandatory. It does not purport to curtail the court's power to define the scope of its process. The section only confers on the court the power to make 'a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.' * * * This at least includes the power to fix, on its own motion, the scope of the decree which it may be required to enforce by contempt proceedings, in conformity to recognized equitable standards applied to the record before it."

Contrary to counsel's assertion (Bd. Br. 74), the Board is not at liberty to disregard, and the Court

may weigh the Examiner's factual finding that the record does not "indicate a general disposition to violate the Act * * *" (R. 223). *National Labor Relations Bd. v. Universal Camera Co.*, 340 U. S. 474.

As the courts have recognized, broad cease and desist orders tend to make the courts of appeals trial courts in policing labor relations. This is emphasized by the court in *National Labor Relations Bd. v. Reed & Prince Mfg. Co.*, 1 Cir., 196 F. 2d 755, involving a proceeding for contempt brought eleven years after entry of a broad cease and desist decree. The court observed, p. 759:

"As more and more employers come under enforcement decrees in such broad terms, the courts of appeals will gradually supplant the Board as the primary trier of facts when future unfair labor practices are alleged, if the Board elects generally to proceed, as it has done in this case, by filing a petition for adjudication in civil contempt.

"* * *

"The Board's present petition would cast upon the court the burden of conducting what promises to be a lengthy hearing, either by itself or by reference to a master, for the purpose of making an independent determination of whether the company has failed and refused to bargain collectively in good faith, in violation of the Act. It is not easy to see what the Board would gain by invoking such a procedure."

In the instant case, the Board said it was "convinced" of the "danger" of "future" commission of unfair labor practices (R. 283). The only means of

testing this conviction and prognosis of the future is to measure it against the numerous facts establishing the excellent labor relations in the three years involved in the record.

(a) Lodge 751 was certified as the bargaining agent on January 19, 1950. Negotiations commenced shortly thereafter. The meetings were characterized by Lodge 751 and its president, Gibson, as "very amicable" (Resp. Ex. 83, R. 3949), and again on March 2, 1950, as "proof of the desire of both the union and the company to arrive at a satisfactory agreement at an early date" (Resp. Ex. 84, R. 3949).

(b) A collective bargaining agreement was entered into May 22, 1950 (Resp. Ex. 57).

(c) Vice President Logan testified as to the execution of two labor agreements negotiated with Lodge 751 and observed that the relationship between the Company and the union was never as good as in the last two years "and is now" (R. (2320)). He expressed the view that there had been "phenomenal progress" in the relationship between the Company and the union, as such, and between the workers and their immediate supervisors (R. 2321).

(d) Huleen testified that 241 grievances were filed in 1947 and 112 in 1948 in the few months preceding the strike. In contrast with this is the outstanding fact that, since the May, 1950, contract

and until the date of his testifying, only one grievance was filed and this was withdrawn without processing (R. 2366).

With a vigilant union, we may be sure that if there had been any discrimination in the subsequent discharges and layoffs, they would have at least been the subject of grievances.

The case cited by counsel, *National Labor Relations Bd. v. Seven-Up Bottling Co.*, 344 U. S. 344, 349, quoting from *Virginia Electric & P. Co. v. National Labor Relations Bd.*, 319 U. S. 533, as to the permissible scope of a Board remedy, is not in point. The Board remedies reviewed in these cases related solely to repayment of union dues checked off and the formula for computing back pay awards to individuals. They did not involve the propriety of a broad cease and desist order. In the *Seven-Up* case, the court noted a limitation on the Board's authority, saying that it could not apply a remedy without regard to whether in particular circumstances the ordered remedy would be "* * * oppressive and therefore not calculated to effectuate a policy of the Act."

All of the foregoing indicates that the Board's conviction and forecast are unwarranted and renders its order oppressive and an abuse of discretion.

Conclusion

For the reasons set forth in our opening brief and in this reply brief, it is submitted that the Board's order should be set aside, in its entirety, and the petition for enforcement should be denied.

Respectfully submitted,

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No. 13802

**In the United States Court of Appeals
for the Ninth Circuit**

BOEING AIRPLANE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**ON PETITION FOR REVIEW AND REQUEST FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

**SUPPLEMENTAL BRIEF OF THE NATIONAL LABOR RELATIONS
BOARD IN ANSWER TO BRIEF OF INTERVENORS**

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No. 13802

BOEING AIRPLANE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

*ON PETITION FOR REVIEW AND REQUEST FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

**SUPPLEMENTAL BRIEF OF THE NATIONAL LABOR RELATIONS
BOARD IN ANSWER TO BRIEF OF INTERVENORS**

This supplemental brief is submitted in answer to the brief filed by the intervenors.

Intervenors are Joseph A. Pepin and Peter P. Pioli. The complaint issued by the General Counsel of the Board alleged that the intervenors were discriminated against by the Company (R. 14, 16). The Board dismissed the complaint with respect to the intervenors, finding that the allegations of discrimination were unsupported by a preponderance of the evidence (R. 163-165, 217 (Pepin); R. 69-71, 199 (Pioli)). Invoking the jurisdiction of this Court to review at the instance of an aggrieved person a final order of the Board denying the relief sought (Sec. 10 (f) of the Act; *Albrecht v. N. L. R. B.*, 181 F. 2d 652, 653-655 (C. A. 7)), intervenors petitioned this Court to

set aside the order of dismissal as without substantial support in the evidence and to "grant these petitioners relief * * *" (R. 4473, 4470-4474).

The question presented is whether, considering the evidence as a whole, the Board reasonably concluded that there was a failure of proof with respect to the intervenors. More precisely, since the Board found that the evidence did not preponderate in favor of a finding of discrimination and since the relief requested by petitioners requires such finding, the question is whether the evidence is so compelling that there is no reasonable alternative to finding that intervenors were discriminated against. In other words, if the trial were to a jury, the trial judge would be required to direct a verdict in intervenors' favor.

We now show that intervenors have not sustained the burden of establishing that the evidence compelled a finding in their favor.

1. Joseph A. Pepin

On October 28, 1949, employee Pepin, a timekeeper, was "laid off for lack of work" (R. 1784-1785), in conjunction with the layoff of 10 or 12 others in his job classification occasioned by "a surplus of timekeepers in or about that period" (R. 2702-2703, 2707-2708). The decision to lay off Pepin was made by Lynn Morrell, the chief timekeeper (R. 2708). The implied basis for Pepin's selection for layoff, as testified to by Morrell, was his uncooperative attitude in discharging his job obligations. As explained by Morrell (R. 2706):

That was his attitude all the way along. His whole attitude was that he knew just how far he could go, and he was going to go to the limit; there was never enough to get enough evidence against him to make a full week on him, you might say—but continually just going up to the borderline, and then antagonizing, and then stopping.

Three instances of actual dereliction on Pepin's part, occurring before the strike, were testified to by Morrell: (1) Pepin abused an overtime privilege extended timekeepers; timekeepers were asked to report six minutes before the regular reporting time in order to assist new employees in clocking in, and if they reported only four minutes earlier, they would nevertheless be paid for the full six minutes; Pepin would report for less than the full six minutes, thereby "not going into the spirit of the order of the overtime in working a full 6 minutes" (R. 2705-2706, 4441-4446); (2) Pepin was apprehended by a guard in the mail room going through the mail, an act for which Pepin was disciplined by a two week suspension (R. 2704-2705, 2708-2710; Pepin "was caught playing poker down in the tunnel with some other employees" and reprimanded for it (R. 2704, 2709).

The examiner credited "the testimony of Lynn Morrell concerning the layoff of Joseph Pepin" (R. 217). Acceptance of this testimony obviously provides a nondiscriminatory basis for Pepin's selection for layoff when a surplus of personnel required a reduction in force among the timekeepers. Intervenors' brief attempts therefore to show that this testimony is unworthy of credence.

To this end, emphasis is placed on the fact that the three acts of misconduct occurred before the strike, and therefore at a time well before the layoff. This might be significant if these acts were advanced as the reason for the layoff; but they were actually cited as illustrative of a continuing attitude and the layoff was ascribed to the attitude, not the particular acts. Furthermore, in describing the attitude, Morrell stated that the gist of its undesirability was that Pepin would not do more than just enough to get by without actually overstepping—"There was never enough to get enough evidence against him * * * but continually just going up to the borderline * * * and then stopping." If the witness was sincere in this evaluation of the attitude, as the examiner found Morrell to be, it is patently not enough to undo this credibility determination to show there was a paucity of actual acts of misconduct and that these occurred before the strike. This was consistent with the attitude described.

In a further attempt to show that Morrell is not to be believed, intervenors contend in effect that he exaggerated the incidents of misconduct. To the extent that this assertion rests on conflicts in the testimony of Morrell and Pepin,¹ there is obviously no way to determine on the cold record which of the two was exaggerating and which minimizing. The examiner's credibility determination cannot be impeached on this basis. We turn therefore to the other evidence. As to the abuse of the overtime privilege, the documen-

¹ The testimony of Morrell appears at R. 2702-2712, 4441-4445, that of Pepin at R. 1781-1795, 4082-4107.

tary evidence shows that for the 44 working days before this privilege was removed from Pepin because of abuse, Pepin clocked in no earlier than four minutes before reporting time on five occasions and no earlier than three minutes before reporting time on six occasions. This incidence of uncooperativeness could well be vexing to management. As to poker playing, two witnesses testified that Pepin did play with them and that they had all been reprimanded for it, but contrary to Morrell's statement (R. 2704), they denied that they had overstayed the lunch period in the process (R. 4373-4377). There was thus confirmation of Morrell's testimony that poker playing was a reprimandable offense but disagreement as to whether the offense extended to playing on working time. The examiner could well have concluded either (1) that this was an insignificant tangential contradiction attributable to imperfectness of memory rather than to insincerity and that it had no bearing on the essential truth of Morrell's testimony, or (2) that Morrell was to be believed and the two witnesses disbelieved. In either event the question was within the examiner's province as the observer of the witnesses to resolve. Finally, as to the mail room incident, the two witnesses relied upon to discredit Morrell confirm rather than contradict his testimony (R. 4391-4394, 4396-4402). Any differences in the testimony were not serious; none professed to remember the incident with exactitude; as one of the witnesses repeatedly explained, "I have been away from it for a long time" (R. 4402, 4397, 4399, 4400).

Intervenors have thus advanced no grounds adequate to undo the examiner's determination that Morrell testified truthfully concerning the reason for Pepin's layoff. More fundamentally, however, they have been unable to establish affirmatively any connection between Pepin's union activity and his layoff. Intervenors stress Pepin's prominence in IAM union activity. But prominent union activity standing alone is not evidence that a discharge is discriminatory. To bridge the gap, intervenors rely on Pepin's testimony to the effect that Kelby De Priest, a Teamsters organizer, told Pepin that no matter whether the IAM or Teamsters won the election, "I will bet you \$10.00 you won't be here in six weeks" (R. 1786-1787; Int. Br., pp. 5, 7). To the extent that De Priest's statement professes to be an expression of management's attitude, the evidence is hearsay, and since the statement it reports is not attributed to a person shown to be an agent of the Company authorized to deal with employment, it is not within the exception to the hearsay rule and is therefore incompetent.² In addition, intervenors rely (Br., pp. 5-6) on Morrell's warning to Pepin on October 22, 1948, upon the latter's return to work at the end of the IAM strike, that he "could not engage in any union activities, and the least infraction would mean my dismissal instantly" (R. 1791, 1793). Without doubt this warning was illegal (Bd.'s main brief, pp. 45-47), but there was no evi-

² The situation is thus quite different from that discussed at pp. 36-37 of the Board's main brief.

dence to connect this warning with the layoff which did not occur until one year later.

Finally, intervenors strongly claim (Br., pp. 3-6, 14-16) that the Board's acceptance of the examiner's crediting of Morrell's explanation of the reason for Pepin's layoff cannot stand consistently with the Board's rejection of the examiner's crediting of Morrell's explanation of the reason for Gerber's discharge. But as we explained in our main brief (pp. 58-61), the heart of Morrell's testimony with respect to Gerber was flatly contradicted by the Company's own records and by admissions of the Company's assistant labor relations manager, an inconsistency which observation of demeanor was incapable of resolving in favor of Morrell's credence insofar as his testimony concerned Gerber. Thus, Morrell's testimony with respect to Gerber was "in conflict with contemporaneous documents" and therefore could be given "little weight. * * *". *United States v. United States Gypsum Co.*, 323 U. S. 364, 396. No comparable basis exists for discrediting Morrell's testimony with respect to Pepin. Intervenor's claim reduces therefore to the assertion that if Morrell was unreliable on one issue he could not be believed on any. It suffices to say, in the words of Judge Learned Hand, "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *N. L. R. B. v. Universal Camera Corp.*, 179 F. 2d 749, 754 (C. A. 2), reversed on other grounds, 340 U. S. 474.

2. Peter P. Pioli

With respect to employee Pioli, the intervenors accept the underlying findings of fact pertinent to his discharge but contend that these facts were wrongly interpreted and that the only correct conclusion based on them is that Pioli was discriminatorily discharged. The findings of the examiner, adopted by the Board, with respect to Pioli are as follows (R. 69-70):

Peter Pioli, a tool and die maker, was first employed by Respondent in 1938. For many years Pioli occupied a prominent position in Lodge 751 and during the strike was assistant to one of its business agents and in charge of the picket line. At other times Pioli was a district councilman and district vice president, and at the time of the hearing was serving his fifth term as president of a subsidiary local in the Lodge. Pioli, of course, was a striker and returned to work on October 8, 1948. On November 11 he obtained a permit to go to shop 102 to check on some material, returned to his own shop and then again went to 102 to have a press plane sheared. Upon his return he learned that Assistant Superintendent Hyman had accused him of engaging in union activity during his visit to 102. Pioli approached Hyman and told him that he had gone to 102 on Respondent's business. Hyman, according to Pioli, said "God damn you, Pioli, you know God damn well you were down there in 102 organizing." Pioli answered, "Hyman you are a damn liar. That is something you are going

to have to prove." Hyman retorted, "I don't have to prove anything. Right now they will take my word for it and you are as good as out." Ploh shortly thereafter appeared before a factory review board and although he told the board that Hyman was the first to use untemperate language was nonetheless persecuted.

The conclusion of the examiner, adopted by the Board, based on this incident, is as follows (R. 158):

Respondent was of course aware of Ploh's prominent position in Lodge 751 and of his activity during the strike. Hyman's suspicion that Ploh was absent from his department on union business, though mistaken, was not entirely unreasonable. I find that Hyman profanely accused Ploh of organizing in Department 102 and that Ploh called Hyman a damned liar. I suppose that the discharge which followed could have been the planned result of a contrived situation but I do not believe that the evidence supports such a finding. I will recommend that the complaint as to Ploh be dismissed.

The incident is susceptible either to the interpretation that Ploh was discharged for calling his supervisor "a damned liar" or that the name-calling was utilized as a pretext to conceal antiumion motivation underlying the discharge. Since either interpretation is fairly open, the inference reasonably drawn by the trier of fact must stand. *Radio Officers v. N. L. R. B.*, 22 U. S. Law Week 4297, 4105-4106 (U. S. Sup. Ct., Feb. 1, 1954).

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CONCLUSION

Intervenors have been unable to establish that the evidence supporting their claim is so cogent that there is no reasonable alternative to finding that they were discriminated against. It is therefore respectfully submitted that their petition be denied.

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DAVID P. FINDLING,
Associate General Counsel,

A. NORMAN SOMERS,
Assistant General Counsel,

BERNARD DUNAU,
Attorney,
National Labor Relations Board.

FEBRUARY 1954.

No. 13946.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

HARRY WYNN,

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION, TREASURE
COMPANY, SAMARKAND OIL COMPANY, EMPIRE OIL
COMPANY, TRUST OIL COMPANY, and SOUTHERN
CALIFORNIA GAS COMPANY and G. DE BRETTEVILLE,

Appellees.

**OPENING BRIEF OF APPELLANT
HARRY WYNN.**

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COMPANY, TRUST OIL COMPANY, and SOUTHERN
CALIFORNIA GAS COMPANY and G. DE BRETTEVILLE,

Appellees.

**OPENING BRIEF OF APPELLANT
HARRY WYNN.**

Jurisdiction.

The plaintiff, Harry Wynn, filed this complaint on September 16, 1952, in the Superior Court of the State of California. Summons was issued by the state court on September 16, 1952. [R. pp. 6-8.]

The complaint [R. pp. 8-21] seeks to set aside a contract [R. pp. 149-182] transferring to the Reconstruction Finance Corporation all the assets of Treasure Company and G. de Bretteville, as being in *fraud of creditors*; and alleges that Reconstruction Finance Corporation had full knowledge of the moneys due plaintiff from his royalty interests and also of plaintiff's ownership in the lease-

holds involved, and of the requirements of the California Corporation Commissioner that any such contract must be first submitted to said commissioner for approval; that the contract was not submitted to the California Corporation Commissioner for his approval and *consequent* protection of the royalty holders, and that the contract was made by defendants for the purpose of delaying, hindering and defrauding the creditors of Treasure Company and G. de Bretteville.

The complaint alleges that the contract was re-dated to May 31, 1949, so as to bring its inception *after* the jury trial in the condemnation action. [See contract date, R. p. 150.]

The complaint alleges that said contract provided that the first \$150,000.00 should be paid to *any one* of de Bretteville's *four corporations*, as he might designate. [R. p. 174, line 3, *et seq.*, of contract.]

* * *

All of the defendants, who are residents or corporations of California, except Reconstruction Finance Corporation (its charter permits it to be sued in any state court) filed a Petition for Removal from the state court to the Federal Court on October 6, 1952 [R. pp. 2-5], and the cause was automatically so removed.

All of the defendants filed Answers to the Complaint on October 10, 1952, in the Federal District Court. [R. pp. 22, 27, 31.]

A Motion to Remand the cause to the state court was filed by plaintiff on December 24, 1952. [R. pp. 68-72.]

A Motion for Summary Judgment was filed by all defendants on December 4, 1952.

The Federal Court entered its order granting motion for partial summary judgment and filed same June 8, 1953 [R. pp. 119-120], and Findings of Fact and Conclusions of Law were signed by Judge Hall on June 8, 1953. [R. pp. 113-118.]

An order denying the Motion to Remand was signed by the said judge and filed on June 8, 1953. [R. p. 112.]

Notice of Appeal from the summary judgment and the order denying plaintiff's motion to remand the cause to the state court was filed by plaintiff on July 6, 1953. [R. p. 121.]

The jurisdiction of this Court to *review* the judgment of the District Court is conferred by the provisions of 28 United States Code, Section 1291.

Statutes Involved.

"Corporation organized under federal law as party. The district courts shall *not* have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock. June 25, 1948, c. 646, 62 Stat. 934."

United States Code, Title 28, Sec. 1349.

"Actions removable generally.

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have *original* jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and divi-

sion embracing the place where such action is pending.

“(b) Any civil action of which the district courts have *original* jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable *only* if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.

“(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction. June 25, 1948, c. 646, 62 Stat. 937.”

United States Code, Title 28, Sec. 1441.

“Civil Rights Cases.

“Any of the following civil actions or criminal prosecutions, commenced in a state court may be removed by the defendants to the district court of the United States for the district division embracing the place wherein it is pending:

“(1) Against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

“(2) For any act under color of authority derived from any law providing for equal rights, or for re-

fusing to do any act on the ground that it would be inconsistent with such law. June 25, 1948, c. 646, 62 Stat. 938.”

United States Code, Title 28, Sec. 1443.

Questions Presented by This Appeal.

1. That the Federal District Courts have no jurisdiction of this action.

2. That by reason of such lack of jurisdiction the District Court erred in denying Wynn’s motion to remand the case to the state court from whence it came.

3. That the District Court erred in granting a summary judgment, basing its decision upon a condemnation judgment in another case, which latter judgment did not even pretend to rule upon the allegations of this complaint,—to the effect that a certain contract of assignment was executed in fraud of creditors.

Under the above premises Finding IX [R. p. 115]* is immaterial and Conclusions of Law III [R. p. 117] holding that the issue of the effect of this assignment is *res judicata* is incorrect and the summary judgment based thereon is improper and without justification.

4. That the District Court erred in even considering the condemnation judgment because at the time of the jury trial in the condemnation case the contract under attack in the case at bar was *not in existence*.

Under the above premises Finding VII [R. p. 115] is useless and without legal effect since it refers to find-

*The references preceded by “R.” are to the typewritten record on appeal herein.

ings allotting and distributing the jury award in the condemnation action.

5. The District Court erred in relying upon the condemnation judgment since the question of fraud was not even raised in any of the proceedings in the condemnation action—especially the fraud charged in the complaint in the instant case.

6. The District Court erred in Finding XII [R. p. 116] reading (in part) as follows:

“The said agreement did not transfer, or contemplate the transfer, of any rights in real property to Reconstruction Finance Corporation by Trust Oil Company, nor by Treasure Company, nor by G. de Bretteville.”

The contract under attack refutes said Finding XII because it contains the following clause:

“In order to settle and compromise this dispute and to settle the three companies’ claim for compensation for the taking of their *real and personal* property, the parties hereto, with the approval and consent of the three companies, have entered into this agreement.” [R. p. 153.]

7. The District Court erred in not granting plaintiff’s request to submit the affidavit of the California Corporation Commissioner to the effect that the contract of assignment under attack was not submitted to him for approval as required by his permit, and said court also erred in not granting plaintiff’s request to submit the affidavit of the Attorney General that he had never approved this contract as required by its terms.

This request was made under Rule 56(f) of the Rules of Civil Procedure. [R. pp. 102-104.]

8. The petition for removal to the Federal Court fails to state facts showing that defendants were denied or could not enforce in the state courts any rights secured to them by any law providing for the equal civil rights of United States citizens, as required by Section 1443 of Title 28 of the United States Code. [Petition for Removal, R. pp. 2-5.]

9. The federal courts lack jurisdiction of this action for the following reasons:

1. There is no diversity of citizenship.
2. The action involves a transfer of the assets of a debtor without consideration and in fraud of creditors.
3. The assets are leasehold interests situated in Los Angeles County.
4. The federal courts do not have original jurisdiction of this fraud action and the action does not arise under the Constitution, treaties or laws of the United States as required by the removal statute. (U. S. Code, Title 28, Sec. 1441.)
5. Section 1349 of Title 28 is worded in the negative and confers no jurisdiction upon federal courts.
6. The complaint contains no allegation of the jurisdictional amount required in the federal courts.

10. The Reconstruction Finance Corporation entered into this fraudulent contract *independently* of any condemnation action—took over assets belonging to a debtor—failed to submit this contract for approval to and by the California Corporation Commissioner, as required by the permit of which Reconstruction Finance Corporation was fully informed, and Reconstruction

Finance Corporation rendered itself amenable to the courts of the State of California by knowingly joining with said debtor to defraud the creditors.

11. A condemnation judgment, if any defense, can be submitted in a state court as well as in a federal court and its existence confers no jurisdiction upon the federal courts.

Statement of the Case.

The plaintiff, Harry Wynn, established his ownership of 6 per cent royalty interests in certain leaseholds situated in Los Angeles County and described same in his complaint.

The complaint alleges that one of the leaseholds produced oil and gas which was sold for the sum of \$205,411.69 and that the Treasure Company and G. de Bretteville did not pay Mr. Wynn his 6 per cent of that amount (subject only to deductions of necessary maintenance and operation charges), except the small sum of \$88.54 on one occasion.

On September 28, 1942, the United States of America and the Reconstruction Finance Corporation filed a condemnation action condemning this leasehold and others.

On December 8, 1943, Harry Wynn filed an answer in said condemnation suit and *thereby* in said answer served notice *on Reconstruction Finance Corporation* of the moneys due him from the leasehold by reason of its production. [R. p. 73, line 20, to p. 74, line 4.]

That at the jury trial in the condemnation action there was introduced into evidence a document [R. p. 84, lines 3-10] showing that the California Corporation Com-

missioner required Treasure Company not to make any assignment of this leasehold without getting the approval of said Commissioner by filing the contract of assignment with him, and that the Reconstruction Finance Corporation was thereby and during the jury trial placed on notice of this requirement.

That approximately two weeks *after* the jury's verdict the Reconstruction Finance Corporation, *with full knowledge* of the indebtedness due Harry Wynn from Treasure Company and G. de Bretteville, entered into and executed a certain assignment of this leasehold and thereby received all of the assets of Treasure Company, to the detriment of plaintiff and other creditors having royalty interests in this leasehold.

This contract permitted Treasure Company and its other corporations, which are simply "fronts" for G. de Bretteville, to drill wells and to operate the leaseholds, as ostensible agent for the Reconstruction Finance Corporation, but upon the usual basis of any ordinary oil lease under which the lessee acquires 87½ per cent of production by reason of his operation of the premises. The full import of the contract is pleaded in the complaint. [R. pp. 8-22; see R. pp. 149-182 for contract.]

Plaintiff now seeks to set aside this contract as being in fraud of creditors and to quiet title to his royalty interests in the premises.

The summary judgment is in effect a ruling that the Reconstruction Finance Corporation *evades* the charge of fraud by reason of the condemnation judgment.

The condemnation judgment was rendered *prior* to the time that the Reconstruction Finance Corporation entered

into this alleged fraudulent contract and hence has no effect on the question of fraud here involved.

Under this contract Treasure Company and G. de Bretteville could easily evade any attachment levied by any creditor under the following provision of said contract:

“and that said \$150,000.00 be paid to said three companies (Treasure Company—de Bretteville, President; Samarkand Oil Co.—de Bretteville, President; Empire Oil Company—de Bretteville, President) or their assigns in such proportions as TOC (Trust Oil Company—de Bretteville, President) shall direct immediately upon the filing of said stipulation and the making of the order of the court to make said payment.” [R. p. 174, line 3.]

Specification of Errors.

I.

The District Court erred in accepting jurisdiction in this case and in refusing to remand the case to the state court from whence it came.

II.

The District Court erred in ruling that a judgment in a condemnation proceeding constituted a defense to this action, seeking to set aside a contract by which there was a transfer of property in fraud of creditors, especially since said contract came into existence *after* the condemnation judgment.

III.

The District Court erred in not permitting the plaintiff to produce the affidavit of the California Corporation Commissioner to the effect that this fraudulent contract

assigning all the assets of Treasure Company to Reconstruction Finance Corporation had not been first submitted to said official as required by the permit granted Treasure Company.

IV.

The District Court erred in not permitting the plaintiff to produce the affidavit of the United States Attorney General to the effect that he had never approved this contract now under attack.

ARGUMENT

The first cause of action of the complaint is directed to the setting aside of a written contract entered into in the State of California and pertaining to real estate situated in said state. The mere fact that the Reconstruction Finance Corporation was signatory to this contract does *not change* the nature of the contract and does not make the contract a federal contract.

Nor does the fact that the Reconstruction Finance Corporation signed the contract insert into the contract any federal statute or Act of Congress.

The basis of the first cause of action, as set forth in paragraph XX [R. p. 18], is to reach property belonging to Treasure Company and G. de Bretteville.

The basis of the second cause of action is also to reach property belonging to Treasure Company and G. de Bretteville and, as stated in paragraph II [R. p. 19] of the second cause of action, that said contract and *assignment* therein of all the assets of Treasure Company and G. de Bretteville were intended and were made by the defendants for the purpose of delaying, hindering and

defrauding the creditors of Treasure Company and G. de Bretteville by putting it out of the power of such creditors to reach the property and assets of the said Treasure Company and G. de Bretteville.

Such issue does not involve a federal statute nor an Act of Congress.

The third cause of action [R. pp. 19-20] is in the nature of a quiet title action against certain premises situated in the State of California, by reason of the fact that said contract was fraudulent and therefore could not transfer any of plaintiff's interests or any of the interests of Treasure Company and G. de Bretteville.

It is apparent that if the Reconstruction Finance Corporation has title to any property by reason of a valid judgment, that judgment may be pleaded as a defense in the courts of the State of California.

The Federal District Court Lacks Jurisdiction of This Action.

The case at bar involves equitable principles enforceable only in the state courts.

“* * * The charge against the defendant was not that it had violated the patent laws, but to set aside the license on the ground that it had been *fraudulently and inequitably obtained*. * * *

“It is also pointed out in *Wilson v. Sanford*, 10 How. (U. S.) 99 (13 L. Ed. 344), that an injunction cannot issue unless the contract is set aside, the Court saying, ‘The object of the bill is to have this contract set aside and declared to be forfeited; and the prayer is, “that the appellant’s reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned

by the court,” and for an injunction. But the injunction he asks for is to be the consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside.’ (3) *since Owens’ case was of general equitable jurisdiction it did not arise under the patent laws but under the equity branch of the state law and jurisdiction over it vested in the state court.* (Lockett v. Delpark, 270 U. S. 496 (46 S. Ct. 397, 70 L. Ed. 703, 705); New Marshall Engine Co. v. Marshall Engine Co., 223 U. S. 473, 480 (32 S. Ct. 283, 56 L. Ed. 513, 516).)” (Emphasis added.)

Heinz v. Superior Court, 115 A. C. A. 418-423.

The Case at Bar Is of General Equitable Jurisdiction, Did Not Arise Under Any Federal Law or Statute, but Did Arise Under the State Laws and the Jurisdiction Over It Vested in the State Court.

“It is a general rule that a suit by a patentee for royalties under a license or assignment granted by him, or for any remedy in respect of a contract permitting use of the patent is *not* a suit under the patent laws of the United States, *and cannot be maintained in a Federal court as such.* Wilson v. Sanford, 10 How. 99, 13 L. ed. 344; Brown v. Shannon, 20 How. 55, 15 L. ed. 826; Hartell v. Tilghman, 99 U. S. 547, 25 L. ed. 357; Albright v. Teas, 106 U. S. 613, 27 L. ed. 295, 1 Sup. Ct. Rep. 550; Dale Tile Mfg. (503) Co. v. Hyatt, 125 U. S. 46, 31 L. ed. 683, 8 Sup. Ct. Rep. 756; Marsh v. Nichols, S. & Co., 140 U. S. 344, 35 L. ed. 413, 11 Sup. Ct. Rep. 798; Briggs v. United Shoe Machinery Co., 239 U. S. 48, 60 L. ed. 138.

“In Wilson v. Sanford, *supra*, a bill in equity was filed in a Federal circuit court setting forth complainant’s ownership of a patent, an assignment to

defendants of a license in consideration of five promissory notes, with a condition of reversion to complainant on failure to pay any note. The bill averred that the first two notes were not paid, insisted that the license was forfeited by the failure and the licensor was fully reinvested at law and in equity with all his original rights, that the defendants were using the patented machine and were infringing the patent, prayed an account of profits since forfeiture, a temporary and permanent injunction, and a reinvestiture of title in the complainant. On demurrer, *the bill was dismissed for lack of jurisdiction* as not arising under the patent laws. Chief Justice Taney, speaking for the court, said:

“The rights of the parties depend *altogether upon common law and equity principles*. The object of the bill is to have the *contract set aside and declared to be forfeited*; and the prayer is ‘that the appellant’s reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by the court,’ and for an injunction. But the injunction he asks for is in consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside. And if the case made in the bill was a fit one for relief in equity, it is very clear that whether the contract ought to be declared forfeited or not, in a court of chancery, *depended altogether upon rules and principles of equity*, and in no degree whatever upon any act of Congress concerning patent rights.” (Emphasis added.)

Luckett v. Delpark, 270 U. S. 496.

**In the Case at Bar the Rights of the Parties Depend
Altogether Upon Common Law and Principles
of Equity.**

“The Federal courts have exclusive jurisdiction of all cases arising under the patent laws, but not of all questions in which a patent may be the subject-matter of the controversy. *For courts of a state may try questions of title, and may construe and enforce contracts relating to patents.* Wade v. Lawder, 165 U. S. 627, 41 L. ed. 852, 17 Sup. Ct. Rep. 425. *The present litigation belongs to this case.*” (Emphasis added.)

New Marshall Engine Co. v. Marshall Engine Co.,
223 U. S. 473 (32 S. Ct. 238, 56 L. Ed. 513-
516).

Appellant submits that *in the case at bar the state court must try questions of fraud, validity of a contract and title to property.*

**That Negative Section of the United States Code
Does Not Confer Jurisdiction Upon the District
Court:**

Title 28, United States Code Annotated, Section 1349, reads as follows:

“The district courts shall *not* have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress unless the United States is the owner of more than one-half of its capital stock.”

It will be noted that the above section is worded in the *negative*. It states that the district courts shall not

have jurisdiction upon the ground of incorporation by an Act of Congress unless more than one-half of its capital stock is owned by the United States.

Note well that the section does not say that it has any jurisdiction of anything, either exclusive jurisdiction or original jurisdiction, *even if its capital stock is owned by the United States.*

In other words, we must look to other sections of the United States Code to ascertain the subject-matter which confers jurisdiction.

There Is No Diversity of Citizenship.

The Reconstruction Finance Corporation concedes that diversity of citizenship is not involved in the case at bar.

Complaint Alleging Fraud Confers No Federal Jurisdiction.

In *Rhodes v. National Iron Bank of Pottstown*, 35 Fed. Supp. 650, the complaint alleging fraud *was dismissed* by federal court for want of jurisdiction, as fraud was not a federal question.

Jurisdictional Amount.

The complaint contains no allegation of the jurisdictional amount required for an action in federal courts.

Other Sections of United States Code Do Not Confer Jurisdiction Upon a Federal Court in the Case at Bar.

The United States District Courts do not have *original* jurisdiction of the present civil action.

The claim or right of plaintiff does not arise under the Constitution, treaties or laws of the United States.

Hence the case is not removable under Section 1441 of Title 28 of United States Code—(Actions removable generally).

Section 1443 of Title 28 of United States Code—(Civil Rights cases) does not permit removal of the case at bar because the *petition* for removal *fails to state facts* showing that defendants are denied or cannot enforce in the state courts any rights secured by them of any law providing for the equal civil rights of citizens of the United States.

If defendants rely upon a judgment of the federal court—same may be introduced into the state courts with like effect.

Since the act creating the Reconstruction Finance Corporation permits it “to sue and be sued in a state court,” the ground for removal because of diversity of citizenship does not apply.

Had the complaint been filed originally in the Federal Court, any one of the defendants could have removed it by proper motion to the state court on the grounds that the issues involved were only such issues as are covered by *state law*—both common law and equity.

The Affidavits of the California Corporation Commissioner and the United States Attorney General Would Show an Evasion of the California Law by Reconstruction Finance Corporation and Also Show the Questionable Aspects of This Contract of Assignment.

Plaintiff requested to produce these affidavits [R. pp. 102-104—request] but his request was not granted.

The Reconstruction Finance Corporation was placed on notice of the requirements of the California Corporation Commissioner at the time of the jury trial in *its* condemnation action because the written requirement was introduced into evidence.

The California Corporation Commissioner would have enforced this clause and protected the plaintiff.

“* * * Treasure Company agrees not to sell, encumber, assign, convey or otherwise dispose of its leasehold estate or any interest therein without first making adequate *provision* for the protection of the royalty holders and *submitting* a copy of the assignment, conveyance and/or instrument utilized for such purpose to the Commissioner of Corporations of the State of California.” [R. p. 84, lines 3-10.]

This secret contract was *not* submitted to the California Corporation Commissioner and the Attorney General did *not* approve same.

Certainly the Reconstruction Finance Corporation has knowingly committed a fraud upon the royalty holders in these leaseholds.

Conclusion.

An action to set aside a transfer, whether fraudulent or not, of a debtor's assets and subject same to the payment of his debts and to quiet the title of the creditor in such property wrongfully transferred (with full knowledge on transferee's part of the claims of the creditor) is an action arising "under the equity branch of the state law and jurisdiction over it vested in the state court."

The instant action does not arise under the Constitution, treaties or laws of the United States.

The mere fact that Reconstruction Finance Corporation was named as a defendant, together with five California corporations and one resident of California, does not confer any jurisdiction on a federal court.

There is doubt as to the jurisdiction of the federal court, hence such doubt "is sufficient ground for remanding a removed case to the state court from which it had been removed." (*Georgia v. Southern R. C.*, 255 Fed. 369.)

We submit that the summary judgment should be reversed and that the Order denying the motion to remand the case to the state court should be set aside and the case ordered remanded to the state court from whence it came.

Respectfully submitted,

LELAND J. ALLEN,

Attorney for Appellant Harry Wynn.

No. 13946.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HARRY WYNN,

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION, TREASURE
COMPANY, SAMARKAND OIL Co., EMPIRE OIL
COMPANY, TRUST OIL COMPANY, SOUTHERN CALIFOR-
NIA GAS COMPANY and G. DE BRETTEVILLE,

Appellees.

BRIEF OF APPELLEES.

FILED

NOV 20 1953

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No. 13946.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY WYNN,

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION, TREASURE
COMPANY, SAMARKAND OIL CO., EMPIRE OIL
COMPANY, TRUST OIL COMPANY, SOUTHERN CALIFOR-
NIA GAS COMPANY and G. DE BRETTEVILLE,

Appellees.

BRIEF OF APPELLEES.

Jurisdiction.

Appellant, Harry Wynn, has filed this appeal from an order entered by the United States District Court for the Southern District of California (Central Division) (herein referred to as the "District Court") which was filed by the Honorable Peirson M. Hall, Judge, on June 8, 1953 [R.¹ pp. 119-120] and which granted a Motion for Partial Summary Judgment in favor of appellees in pursuance of Rule 56(d) of the Federal Rules of Civil Procedure. Appellant also appeals from an order of the District Court, filed by Judge Hall on June

¹The references preceded by "R." are to the typewritten record on appeal herein.

8, 1953 [R. p. 112] which denied appellant's motion to Remand the Cause to the Superior Court of the State of California in and for the County of Los Angeles (herein referred to as the "State Court") from which it had been removed by appellees.

The complaint was filed by appellant on September 16, 1952 [R. pp. 8-21], in the State Court and summons was issued by the State Court on September 16, 1952 [R. pp. 6-7].

A Petition for Removal from the State Court to the District Court was filed by all of appellees on October 6, 1952 [R. pp. 2-5] and the cause was thereupon removed to the District Court by operation of law.

The answer of the appellees, Treasure Company, Samarkand Oil Co., Empire Oil Company, Trust Oil Company and G. de Bretteville, was filed in the District Court on October 10, 1952 [R. pp. 22-26]; the answer of the appellee, Southern California Gas Company, was also filed in the District Court on October 10, 1952 [R. pp. 27-30]; and the answer of the appellee, Reconstruction Finance Corporation, was likewise filed in the District Court on October 10, 1952 [R. pp. 31-35].

All of appellees filed a Motion for Summary Judgment on December 4, 1952 [R. pp. 37-55] on the grounds that the pleadings together with certain affidavits [R. pp. 38-55] showed that appellees were entitled to judgment as a matter of law in pursuance of the provisions of Rule 56(b) and (c) of the Federal Rules of Civil Procedure.

Appellant filed a Motion to Remand the Cause to the State Court on December 24, 1952 [R. pp. 68-72].

Notice of Appeal from the aforesaid order of the District Court granting Partial Summary Judgment in favor

of the appellees and from the aforesaid order of the District Court denying appellant's Motion to Remand the Cause to the State Court was filed by appellant on July 6, 1953 [R. p. 121].

Appellant's complaint set forth three purported causes of action against appellees. Under the first cause of action, appellant asserted the right to moneys due to him from the appellees, Treasure Company and G. de Bretteville,² and further asserted that by reason of a certain contract entered into by all of the appellees, the property of his debtors was placed beyond his reach as a creditor, leaving him with no adequate and complete remedy at law for the collection of the indebtedness. Under the second cause of action, appellant sought to have the aforesaid contract adjudged fraudulent and void as against appellant on the grounds that it contains an assignment of all of the assets of the appellees, Treasure Company and G. de Bretteville, which assignment was intended to be and was for the purpose of delaying, hindering and defrauding appellant as a creditor. Under the third cause of action, appellant asserted title to certain participating royalty interests in oil, gas and other hydrocarbon substances produced from certain described property and sought to quiet title to the same as against all of the appellees.

The appellees contend that the District Court had original jurisdiction of the cause for the reason that a federal question exists (28 U. S. C., Sec. 1349) and that by reason of such original jurisdiction the cause was properly removed from the State Court to the District Court (28 U. S. C., Sec. 1441(b)).

²The appellee, G. de Bretteville, was joined as a party defendant on the assumption of appellant that the appellee, Treasure Company, is his *alter ego*. (App. Op. Br. p. 9, lines 15 and 16.)

Appellees do not question the jurisdiction of this Court to review the Order of the District Court overruling appellant's Motion to Remand the Cause to the State Court. The power of this Court to review an appealable order of the District Court arises in pursuance of the provisions of 28 U. S. C., Sec. 1291.

However, it is the position of appellees that the order of the District Court granting a Partial Summary Judgment to appellees is not an appealable order for the reason that it is not a final disposition of the controversy and that, accordingly, an appeal from such Partial Summary Judgment does not presently lie.

Statement of the Case.

On September 28, 1942, a federal condemnation proceeding designated 2454-B Civil was brought in the District Court and resulted in an evaluation trial before a jury which was presided over by the Honorable Campbell E. Beaumont, Judge. This action (hereinafter called the "Evaluation Proceeding") was brought by the United States of America for the use of Reconstruction Finance Corporation under the authority of an Act of Congress approved January 22, 1932 (15 U. S. C. 601-617) as amended, and Public Law 507, 77th Congress, approved March 27, 1942, and Executive Order 9217, issued by the President of the United States on August 7, 1942 (7 F. R. 6177) in pursuance of the so-called "Second War Powers Act" of 1942, approved March 27, 1942 (Public Law 507, 77th Congress) which Acts and Executive Order authorized the Reconstruction Finance Corporation to acquire

by condemnation private property deemed necessary for military, naval or other war purposes.

The Declaration of Taking filed in the Evaluation Proceeding vested a fee simple absolute title in the United States Government on October 26, 1942, in a certain tract of land situate in Los Angeles County, California, which was needed as an underground reservoir for the storage of natural gas in connection with the prosecution of the war effort.

The condemned property was leased by the appellee, Reconstruction Finance Corporation, for whose use and benefit the property was condemned, to the appellee, Southern California Gas Company, and the property has in fact been used for over ten years as a gas storage reservoir.

Prior to the filing of the complaint in the Evaluation Proceeding, appellant had asserted certain participating royalty interests in certain oil and gas leases on portions of the condemned property. Appellant was accordingly named as a defendant in the Evaluation Proceeding and appellant appeared in said proceeding by representation of counsel and filed an answer to the complaint alleging damages owed to him by reason of the government's seizure.

Contrary to the allegations set forth in paragraph II of the first cause of action in appellant's complaint in the action now before this Court [R. p. 9], appellant has not owned any interest whatsoever in those lots which are described in said paragraph of his complaint and which were the subject of the judgment entered in the Evaluat-

tion Proceeding by Judge Beaumont on July 13, 1949 [R. pp. 131-143].

The respective affidavits of the appellee, G. de Bretteville, and of Hector C. Haight, Manager of the Los Angeles Loan Agency of the appellee, Reconstruction Finance Corporation [R. pp. 38-50] designate the lots which were within the Declaration of Taking in the Evaluation Proceeding.

Other lots mentioned in said paragraph II of the first cause of action of appellant's complaint which were not within the perimeter of the area seized in the Evaluation Proceeding are not affected by the aforesaid judgment entered by Judge Beaumont. Appellant's allegation of ownership of participating royalty interests in certain leaseholds on lots *not seized by the government*, as set forth in appellant's complaint, and the denials set forth in each of the answers to the complaint [R. pp. 22, 27, 31] raise a material issue of fact with respect to such alleged ownership.

The District Court refused to grant a full summary judgment in favor of appellees because of the existence of the material issue of fact as to appellant's ownership of participating royalty interests in leaseholds on certain lots which were not within the government's seizure and the District Court therefore granted to appellees only a partial summary judgment.

The evaluation judgment entered by Judge Beaumont provided damages in the sum of \$194,500.00 for the lessee's total working interest in a certain well known as

Treasure Well No. 8. This figure was based upon a verdict of the jury in the Evaluation Proceeding and inasmuch as various parties, including appellant, claimed participating royalty interests in the leasehold estate, distribution of the fund became the subject of a collateral proceeding in the District Court designated 2454-H. W. This proceeding was heard by the Honorable Harry C. Westover, Judge, without a jury, and resulted in a distribution judgment entered on October 30, 1950 [R. pp. 146-148]. The interest of the appellant in the condemnation award was therein held to be \$11,502.00.

Prior to the distribution proceeding before Judge Westover, the appellee, Reconstruction Finance Corporation, entered into a certain agreement dated as of May 31, 1949 [R. pp. 149-182] to which agreement each of the other appellees, except G. de Bretteville, is a party. This agreement did not contain any assignment to the appellee, Reconstruction Finance Corporation, of any leasehold estates in the condemned property and no such assignment could have been contained in the agreement for the reason that the fee simple absolute title to all of the condemned property was then vested in the United States of America. The agreement did provide for an assignment to the appellee, Reconstruction Finance Corporation, for a valuable consideration, of all of the right, title and interest in the said condemnation award of \$194,500.00 which was then being asserted by the appellee, Treasure Company. The appellee, Reconstruction Finance Corporation, as assignee of the appellee, Treasure Company.

became a claimant in the aforesaid distribution proceeding before Judge Westover.

Following the entry of the said distribution judgment by Judge Westover, appeals were brought by each of the claimants, including appellant, to this Court (Case No. 12,961) and an opinion was filed by this Court in said appeal on May 23, 1952.

The appeal now before this Court raises three basic questions:

(1) Was the District Court correct in ruling that it had jurisdiction to adjudicate the issues raised in appellant's complaint and in refusing to remand the cause to the State Court?

(2) Assuming that the District Court did have jurisdiction, is its Order for Partial Summary Judgment a final disposition of the controversy so that it is an appealable order which is properly before this Court at this time?

(3) Assuming that an appeal does presently lie from the District Court's Order for Partial Summary Judgment, was the District Court correct in ruling that the appellees were entitled to such partial summary judgment?

ARGUMENT.

I.

This Action Was Properly Removed to the District Court From the State Court Because It Seeks to Declare as Fraudulent and Void a Certain Contract Entered Into by the Co-defendants, Including Reconstruction Finance Corporation, a Corporation Chartered Under an Act of Congress Whose Entire Capital Stock Is Owned by the United States of America.

The appellee, Reconstruction Finance Corporation, is identified in the complaint as "a federal corporation" [R. p. 8] and the District Court in its Memorandum and Order [R. pp. 108-111] took judicial notice of the fact that more than one-half (viz., all) of the stock of Reconstruction Finance Corporation is owned by the United States. (*Cf.*, *In re Mary Dunn, et al.* (212 U. S. 374) (1909), where the Supreme Court held that on a motion to remand, the federal court could judicially note that a corporate defendant was incorporated by an Act of Congress even without an averment of the fact in the plaintiff's pleadings).

An exhaustive annotation entitled "What actions arise under the laws and treaties of the United States so as to vest jurisdiction in Federal Courts" (14 A. L. R. 2d 992) states at page 1020:

"Of course. if a situation is presented—as still frequently happens—involving an action by or against a Federal corporation of which the United States owns more than one-half the capital stock, a Federal question exists and the Federal trial courts have orig-

inal and removal jurisdiction, by and from the very Federal nature of the corporate litigant, irrespective of the issues or any involvement of Federal laws therein.”

This Court has held that the United States District Court in Portland, Oregon, had jurisdiction on removal of a cause from the Oregon State Court by reason of the fact that the defendant in said action, Reconstruction Finance Corporation, is a corporation created by an Act of Congress with all of its capital stock being owned and held by the United States of America (*Machine Tool and Equipment Corporation v. Reconstruction Finance Corporation* (1942 C. A. 9th), 131 F. 2d 547).

However, the precise jurisdictional question raised in this appeal is whether an action brought in a state court which involves several defendants is removable to a federal court upon the sole ground that one of the defendants is Reconstruction Finance Corporation, a wholly owned government corporation. It is submitted that this question is answered affirmatively by the case of *Sabin v. Home Owners' Loan Corporation* (1945, C. A. 10th Okla.), 147 F. 2d 653, cert. den. 326 U. S. 759, reh. den. 326 U. S. 812, 329 U. S. 823, 330 U. S. 855.

The *Sabin* case involved a corporation which, like Reconstruction Finance Corporation, was chartered under an Act of Congress with all of its capital stock owned by the United States of America. Furthermore, it involved a corporation which, like Reconstruction Finance Corporation, could sue and be sued in any court of competent jurisdiction, federal or state (12 U. S. C. A., Sec. 1463).

In the *Sabin* case the court upheld jurisdiction of the federal court on removal of an action brought by in-

dividuals against the Home Owners' Loan Corporation and others, including its attorneys and officers, the clerk of a state court, the sheriff and his deputies and various persons connected with storage and transfer companies. The complaint had been filed for damages for alleged wrongful conversion of plaintiff's personal property growing out of a foreclosure proceeding which Home Owners' Loan Corporation had brought in the state court.

The Court of Appeals stated in its opinion, in 147 F. 2d at page 655:

"The first contention advanced is that the court erred in denying the motion to remand. All of the defendants joined in the petition for removal. The ground of removal was that the suit was one of a civil nature arising under the laws of the United States. Section 24(1) of the Judicial Court, 28 U. S. C. A., Sec. 41(1) vests in the district courts of the United States jurisdiction of all suits of a civil nature arising under the Constitution and laws of the United States, where the amount in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00; and section 28, 28 U. S. C. A., Sec. 71, authorizes the removal of any case of which the United States Courts are given original jurisdiction. The test for determining the removability of an action is whether the United States Court might have exercised original jurisdiction." (Citing cases.)

"The defendant, Home Owners' Loan Corporation, is a corporation created under the Act of June 13, 1933, 48 Stat. 128, 12 U. S. C. A., Sec. 1461 *et seq.* All of its capital stock is subscribed by the Secretary of the Treasury on behalf of the United States. It is the wholly owned instrumentality of the United States in whose behalf the power to obtain and expend money is exercised. It therefore is entitled to

invoke the jurisdiction of the United States Courts, originally or by removal, save as limited by statute. *Federal Intermediate Credit Bank v. Mitchell*, 277 U. S. 213; *Tennessee Valley Authority v. Tennessee Electric Power Co.*, *supra*.

"It is provided by Sec. 12 of the Act of February 13, 1925, 43 Stat. 941, 28 U. S. C., Sec. 42, that no District Court shall have jurisdiction of any action by or against a corporation on the ground that it was incorporated by or under an Act of Congress, but the statute expressly excludes from its operation actions by or against a corporation chartered by an Act of Congress and in which the United States owns more than one-half of the capital stock. Since Home Owners' Loan Corporation was chartered by an Act of Congress and since all of its capital stock is owned by the United States this statute has no application here. *Federal Intermediate Credit Bank v. Mitchell*, *supra*. The action was removable and the court correctly denied the motion to remand. *Tennessee Valley Authority v. Tennessee Electric Power Co.*, *supra*."

The original assumption of jurisdiction by federal courts over actions involving corporations having federal charters was in pursuance of Mr. Chief Justice Marshall's holding in *Osborne v. Bank of United States*, 9 Wheat. 738 (U. S.) (1824). Prior to 1915 federal courts assumed jurisdiction over actions involving railroads which were incorporated under federal law but in 1915, by Act of Congress, this jurisdiction of the federal courts was removed. In 1925 Congress further limited the jurisdiction of federal courts over federal corporations so that no jurisdiction now vests in the federal courts on the sole ground of federal incorporation where less

than 50% of the capital stock is owned by the United States of America (28 U. S. C. A., Sec. 1349). However, the basic doctrine of *Osborne v. Bank of United States, supra*, except as limited by the aforesaid Acts of Congress, remains fully effective and as held in the *Sabin* case, the grounds for federal jurisdiction are still based upon the existence of a controversy arising under the laws of the United States where an action is brought against a defendant corporation which was chartered by and is wholly owned by the United States of America.

The case of *In re Mary Dunn, et al, supra*, involved a suit brought against a railroad corporation which had been created by an Act of Congress and the decision was rendered in 1909, prior to the above-mentioned congressional action which removed such suits from the jurisdiction of the federal courts. The reasoning of the Supreme Court of the United States in this case is nevertheless pertinent, and is fully applicable to any suit brought against a federal corporation where more than 50% of its stock is owned by the United States of America.

In the *Dunn* case the complaint sought to establish joint liability of the defendant railroad and two of its employees, for negligence. The action was originally brought in the state court in Texas and all of the defendants joined in a petition to the state court to remove the cause to the federal court for the Northern District of Texas.

The ground for the removal was alleged to be that the corporate defendant had been organized and was existing under the laws of the United States and that, accordingly, the suit arose under the laws of the United States and more particularly, under the law of the United States

constituting the charter of the corporate defendant. The removal was opposed by the plaintiffs, but the defendants nevertheless filed a copy of the record in the federal court and the plaintiffs then filed a motion in the federal court to remand the cause to the state court. The defendants answered the motion to remand and stated that while no claim of a separable controversy or of diversity of citizenship was made to support the federal court's jurisdiction, the application to remove was based upon the existence of a federal question as to all of the defendants.

The motion by the plaintiffs to remand was denied and the plaintiffs thereupon made an original application to the United States Supreme Court for a ruling directing the federal judge to show cause why the action should not be remanded to the state court.

The United States Supreme Court held that the Circuit Court of the United States for the Northern District of Texas had obtained jurisdiction by the proceedings for the removal and the rule to show cause was therefore discharged.

The opinion of the Supreme Court states:

"If the question were as to the right to remove a case to the Federal court where the sole defendant was a corporation created by an act of Congress, there can be no dispute as to the right of such a defendant to claim the removal. As the corporation derives all its rights from a law of Congress, a suit brought against it on account of its action arises under the Constitution or laws of the United States. *Osborn v. Bank of United States*, 9 Wheat. 738, 817, 828, 6 L. ed. 204, 223, 225; *Pacific R. Removal Cases*, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113. See also act of incorporation of the Texas & Pacific Railroad Company, 16 Stat. at L. 573, chap.

122, giving the right to the corporation (p. 574, §1) to sue and be sued in all the courts of law and equity within the United States.

“The question, then, is whether the United States circuit court for the proper district (northern district of Texas) would have had jurisdiction of a suit commenced in that district by the plaintiffs against the railway company and the two individual defendants. A suit against the company would, as we have seen, be one arising under the Constitution or laws of the United States, and as the individual defendants resided in the state of Texas (the same state as the plaintiffs) the ground of jurisdiction of the Federal court as to them must be that, by joining all as defendants in a joint action for the same wrong done by all of them, the plaintiffs thereby made the suit against the individual defendants also one which arises under the Constitution or laws of the United States.

“The plaintiffs themselves have made the act of which they complain a joint one, and, being one which arises under the Constitution and laws of the United States as to one of the defendants, it becomes so as to all, because it is joint. The Federal character permeates the whole case, including the individual defendants as well as the corporation. The case which plaintiffs make in their petition in the suit must determine the character of the cause of action. *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, 216, 50 L. ed. 441, 446, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147. The acts of the individual defendants were not necessarily, in and of themselves, inherently of a Federal nature.”

See also a similar holding of the Supreme Court in *Texas etc. Ry. Co. v. Eastin*, 214 U. S. 153 (1909), and similar holdings collected in 14 A. L. R. 2d at page 1031.

On the basis of the foregoing authorities, it is submitted that this action was properly removed from the State Court to the District Court, on the sole ground that the appellee, Reconstruction Finance Corporation, was named as a party defendant. It is further submitted that it was proper for the District Court to assume jurisdiction over the entire dispute inasmuch as a suit to declare a contract void requires that all parties to the contract be made parties to the suit. *Shields v. Barrow* (17 How. 130, 15 L. Ed. 158); *United States v. Northern Pacific Railroad Co.* (134 Fed. 715).

This Action Was Properly Removed to the District Court Because It Seeks to Quiet Title in Appellant to Certain Property Rights Which the Complaint Admits to Have Been the Subject of a Federal Condemnation Proceeding and Because the Relief Which Is Sought, as Disclosed on the Face of the Complaint, Would Obstruct and Defeat the Enforcement of a Judgment Duly Entered in Said Condemnation Proceeding, Thus Raising a Federal Question.

Appellant's complaint admits in paragraph IX of the first cause of action [R. pp. 11-12] that the premises in which appellant seeks to quiet title to certain participating oil and gas royalties, were the subject of the Evaluation Proceeding.

Notwithstanding this admission, and notwithstanding the fact that Judge Beaumont's judgment holds that the property seized in the Evaluation Proceeding was vested in the United States of America in fee simple absolute on October 26, 1942 [R. p. 139], appellant's complaint alleges that the oil and gas leases in which participating royalty interests are claimed, were transferred to the appellee, Reconstruction Finance Corporation, by the appel-

lee, Treasure Company, in pursuance of a fraudulent contract entered into as late as 1949 [R. pp. 13-14].

As previously stated, all right, title and interest of the appellee, Treasure Company, in and to the leasehold estates on property which was the subject of the Evaluation Proceeding, had been divested as of October 26, 1942, and the appellee, Treasure Company, therefore had no right, title or interest in such leaseholds which it could have conveyed or transferred to the appellee, Reconstruction Finance Corporation. Inasmuch as appellant had been also divested of all of his right, title and interest in and to any participating royalty interests in said leasehold estates as of October 26, 1942,³ it is not within the province of any state court in California to hold that appellant is and has been the owner of such participating royalty interests since the 5th day of April, 1938, as alleged in paragraph II of the first cause of action in appellant's complaint [R. p. 9].

The attempt, therefore, by appellant to have a state court determine that the appellee, Treasure Company, did own the leasehold estates in question at the time that it entered into the said contract with the appellee, Reconstruction Finance Corporation and others, that said contract was fraudulent and void, that appellant still owns his participating royalty interests in said leaseholds, and that a receiver should be appointed to account to appellant for the production from said leaseholds subsequent to the date of said contract, is an attempt on the part of appellant to impeach the validity of a judgment duly entered in the federal court which is final and binding.

³As set forth in the Statement of the Case, *supra*, appellant claimed damages for this divestiture, obtained a judgment and had the judgment reviewed by this Court.

In *Beauville Associates, Inc. v. Lojoy Corporation, et al.* (C. A. Fla., 1950), 181 F. 2d 5, cert. den. 340 U. S. 905 (1950), the plaintiff sued the defendants in the State Court of Florida, attacking the defendants' title to property which the defendants had acquired under an order of the United States District Court in Miami. The defendants removed the cause to the federal court on the ground that the suit was one arising out of an attack upon the validity of the federal court's order and, therefore, was a civil action founded on a claim or right arising under the laws of the United States. A motion to remand was filed by the plaintiff, together with a motion to vacate the order dismissing the plaintiff's complaint. Both motions were denied and on appeal to the United States Court of Appeals for the Fifth Circuit, the trial court's judgment was affirmed.

The appellate court said:

"Plaintiff, appealing from the orders of May 6th and May 13th, 1949, is here urging: (1) that its suit was not based upon a federal question, and, therefore, it should have been remanded; and (2) that, if the federal court had jurisdiction, it was error to dismiss the bill of complaint because it set forth facts which, if true, stated a cause of action.

"We cannot agree with either of these contentions. It is quite clear, upon the authorities, that the suit was founded upon, and raised, a federal question authorizing its removal to the federal court. It is further clear, that the complaint and the amended complaint present nothing more than an effort, to do by indirection in the state court what it had been denied

the right to do by intervention in the federal court. This was to relitigate in the state court matters already determined in the federal court.

“It is quite plain that this is just another of the attempts of appellant, persisted in almost to the point of, if not beyond, contumacy, to continue to litigate matters already conclusively determined against its predecessor in title and itself. The judgment appealed from is Affirmed.”

In *Torquay Corporation v. Radio Corporation of America, et al.* (D. C. N. Y., 1932), 2 Fed. Supp. 841, a suit in a state court, attacking the title to property acquired under a decree of a federal court, was held to involve a federal question and, therefore, to be removable. The federal court, in denying a motion to remand, held that from the allegations of the complaint it appeared that the relief sought, if granted, would constitute an interference with the operation of a decree of the federal court in an antitrust case and that the effect of the requested relief would be nothing less than modification of the terms of that decree in so far as it related to the disposition of certain stock in a corporation held by some of the defendants.

It is true that appellant's complaint does not expressly attack the validity of the condemnation judgment entered by Judge Beaumont on July 13, 1949 [R. pp. 131-143], but if the relief which the complaint seeks were granted the effect could be nothing less than the modification of the judgment inasmuch as it would destroy the fee simple absolute title to property which the condemnation

judgment vested in the United States of America. It follows that if the relief sought were in fact granted by the state court a federal question would be raised which could be reviewed by the Supreme Court of the United States which has held that the action of a state court in enjoining a defendant from doing acts pursuant to a valid decree of a federal court is error; *Central National Bank v. Stevens*, 169 U. S. 432 (1898).

The Removal of This Action to the District Court Was Not Affected by the Failure of the Complaint to Contain an Express Allegation of the Jurisdictional Amount.

Appellant's Opening Brief states at page 16:

"The complaint contains no allegation of the jurisdictional amount required for an action in federal courts."

In answer to this particular argument, attention is directed to paragraph X of the first cause of action of the complaint [R. p. 13], in which appellant's monetary claim is stated to be \$10,270.58. Further attention is called to paragraph XX of the first cause of action [R. p. 18], which suggests that appellant's "claim" must remain unpaid unless the relief requested is granted to appellant and to the prayer that a receiver be directed to sell property now in the custody of the appellee, Reconstruction Finance Corporation [R. pp. 20-21].

It is submitted that the above quoted references to the complaint clearly evidence that appellant is seeking in this action a monetary recovery in excess of \$3,000.00.

In addition, it is well established that for purposes of determining the jurisdictional amount in the removal of a cause to the federal court where a property right is asserted, the value of the property is the amount in controversy. 76 Corpus Juris Secundum states at page 947:

“When a property right is to be asserted by specific performance or protected by injunction, the value of that right is the amount in controversy within the meaning of the statutes relating to the removal of causes from a state court to a federal court. So in a suit in which plaintiff’s title to real estate is in issue, or in which he seeks to quiet his title or remove a cloud therefrom, the value of such title, and not the value of the right or interest claimed by defendant, is the amount or value in controversy;
* * * The whole value of the property, the enjoyment of which is in issue, is the measure of the value of the matter in controversy for the purpose of determining the jurisdictional amount.”

In this connection it is to be noted that the complaint asserts a cause of action in which appellant seeks to quiet title to six 1% participating royalty interests in certain oil and gas leases, on lots which were the subject of the Evaluation Proceeding. The District Court could judicially notice that the value of said six 1% participating royalty interests of appellant in the leases described in Parcel 1, in paragraph II of the first cause of action of the complaint [R. p. 9], has been held to be \$11,502.00 in the distribution judgment filed on October 30, 1950, by

Judge Westover [R. p. 147]. Therefore, the jurisdictional amount of \$3,000.00 is satisfied on the basis of the quiet title cause of action alone. See also *Ayers v. Watson*, 113 U. S. 594, 28 L. Ed. 1093, 5 S. Ct. 641.

There is an additional answer to appellant's suggestion that the jurisdictional amount is not established in the case at bar. There is no necessity that the amount in controversy exceed \$3,000.00 where the defendant is a wholly-owned corporation of the United States.

In *School District of Warminster Township v. Reconstruction Finance Corporation* (D. C. E. D. of Penn., 1947), 72 Fed. Supp. 149), a suit was brought by the plaintiff Township, seeking monetary damages in the amount of \$582.20, as a penalty, representing 5% of the principal amount of certain real estate taxes which the plaintiff alleged that the defendant owed and had failed to pay when due. The plaintiff brought its suit in the Court of Common Pleas of Bucks County, Pennsylvania, and the defendant had the cause removed to the Federal District Court for the Eastern District of Pennsylvania. Plaintiff thereupon filed a motion to remand the cause to the state court, and one argument pressed by the plaintiff was that the amount in controversy did not exceed the jurisdictional requirement of \$3,000.00. The question was argued and plaintiff's motion to remand was overruled.

II.

Assuming That the District Court Did Have Jurisdiction of the Cause, Its Order for Partial Summary Judgment in Pursuance of Rule 56(d) of the Federal Rules of Civil Procedure Was Not a Final Disposition of the Controversy and Accordingly Is Not Appealable and Is Not Properly Before This Court at This Time.

Judge Hall filed a Memorandum and Order in this action on May 4, 1953 [R. pp. 108-111].

The memorandum opinion stated that if all of the property described in appellant's complaint had been the subject of the Evaluation Proceeding, the appellees would have been entitled to a summary judgment. Because it appeared that a portion of the property, so described, had not been condemned by the government the opinion stated that it could not be said that there was no genuine issue of material fact for the reason that appellant has not yet had his day in court to attack the validity of the subject contract⁴ with respect to the property not seized. Accordingly, the motion for summary judgment was denied in part and granted in part.

The partial summary judgment contemplated by Rule 56(d) of the Federal Rules of Civil Procedure is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. It is not a final judgment and therefore is not appealable except in instances where an appeal is expressly permitted by statute.

⁴The contract under attack makes no reference to any property which was not condemned in the Evaluation Proceeding.

In *Leonard v. Socony-Vacuum Oil Co.* (C. C. A. 7th, 1942), 130 F. 2d 535, it was held that a partial summary judgment was not final and not appealable. The Court said:

"It seems quite apparent that the draftsmen were attempting, by providing for partial summary judgment, merely to speed up the trial by eliminating what were not deemed proper issues. The rule is very similar to Rule 16 concerning pretrial procedure for formulation of issues by the court in conference with the parties. In fact, the drafters expressly indicated that the same purpose lay behind both."

In *Audi Vision Inc. v. RCA Mfg. Co.* (C. C. A. 2d, 1943), 136 F. 2d 625, the trial court had granted the defendant's motion for summary judgment on one counterclaim but had left another counterclaim to be tried. On appeal it was held that the two counterclaims were so closely connected that the order was not final and was therefore not appealable. The Court said:

"If the district court will take care in cases such as this to make it clear that its order is of the pretrial type as authorized under these rules, the parties will then more fully recognize their rights and the court will have retained full power, as it should, to make one complete adjudication on all aspects of the case when the proper time comes."

Holdings consonant with *Leonard v. Socony-Vacuum Oil Co.*, *supra*, and *Audi Vision, Inc. v. RCA Mfg. Co.*, *supra*, to the effect that an appeal does not lie from a partial summary judgment under said Rule 56(d), include:

Russell v. Barnes Foundation (C. C. A. 3d, 1943), 136 F. 2d 654; *Coffman v. Federal Laboratories* (C. C. A. 3d, 1948), 171 F. 2d 94, cert. den. 336 U. S. 913; *Biggins v. Oltmer Iron Works* (C. C. A. 7th, 1946), 154 F. 2d 214.

An authoritative article on summary judgment under federal practice by the Honorable Leon R. Yankwich, Chief Judge of the United States District Court for the Southern District of California, appears in 40 California Law Review 204. This article contains the following discussion of partial summary judgments at page 221:

“Both before and after the 1947 amendments, it was contemplated that if judgment was not rendered upon the whole case, or for all of the relief asked, and trial became necessary, the court on hearing the motion should nevertheless ascertain the material facts which exist without controversy and make such an order stating such facts, which may include the extent to which the amount of damages or other relief is not in controversy, and directing further proceedings. The facts so specified in the order are deemed to be established for the purpose of the further proceedings. This is sometimes referred to as a ‘partial summary judgment.’ The phrase, however, involves a contradiction of terms. For a judgment is a final disposition of the controversy from which an appeal lies. And the courts have held definitely that an appeal from such partial summary judgment does not lie.”

It is stated in Volume 3 of the treatise "Federal Practice and Procedure" by Barron and Holtzoff at page 117:

"Thus it appears that an order entered under Rule 56(d) is not appealable merely because it is called a partial summary 'judgment.' The finality and appealability of a summary decision disposing of part of an action must be determined under Rule 54(b). That rule was recently amended to provide that when more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, the court may direct the entry of a final judgment upon one or more but less than all the claims only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all of the claims."

It is submitted that the Order Granting Motion for Partial Summary Judgment under Rule 56(d) of the Federal Rules of Civil Procedure entered by Judge Hall on June 8, 1953 [R. pp. 119-120], from which appellant brings this appeal, is not a final disposition of the controversy and is not an appealable order under the authorities above cited.

III.

Assuming That an Appeal Does Presently Lie From the District Court's Order Granting Motion for Partial Summary Judgment in Favor of the Appellees, the Order Should Be Affirmed by This Court Because There Is No Genuine Issue of Material Fact Between the Parties With Respect to Property Rights Which Have Been Adjudicated by a Previous Judgment of the District Court Which Is Final.

The question presented by a motion for summary judgment is whether or not there is a genuine issue of material fact and not how that issue should be determined. *Gifford v. Travelers Protective Assn. of America* (C. C. A. 9th, 1946) (153 F. 2d 1209); and *Koepke v. Fontecchio* (C. C. A. 9th, 1949) (177 F. 2d 125).

Where there is no genuine issue of material fact but only a question of law, summary judgment is uniformly held to be proper. *New York State Guernsey Breeder's Co-Op v. Wickard* (C. C. A. 2d, 1944) (141 F. 2d 805) (cert. den. 323 U. S. 725).

In *Sabin v. Home Owners' Loan Corp.*, *supra*, it was held that where matters urged by the plaintiff had been considered and passed upon by appropriate appellate courts and adjudicated against the plaintiffs, summary judgment against the plaintiffs was proper because the issues were *res judicata*.

The District Court was correct in concluding that there can be no genuine issue of material fact with respect to any property right asserted by appellant in those lots

described in his complaint which were seized by the government in lawful condemnation on October 26, 1942. The partial summary judgment granted to the appellees was strictly limited to the causes of action asserted by appellant with respect to these condemned lots, and appellees were entitled to such an order because appellant's claims had been previously determined in another action, thus raising the defense that the prior judgment is *res judicata*.

Appellees' motion for summary judgment was based in part upon the ground that the issues raised had been previously determined in another action and the District Court was therefore permitted to consider the record, briefs and admissions in the prior action. *Bonds v. Sherburne Mercantile Co.* (C. C. A. 9th, 1948) (169 F. 2d 433) (cert. den. 335 U. S. 899).

An examination of the judgment entered by Judge Beaumont in the Evaluation Proceeding [R. pp. 131-143] shows that title to the condemned lots vested in the United States of America as of October 26, 1942. The record shows that no appeal was taken from this judgment and that it is now final. The statute of limitation has run against any attempt to dispute the government's possession. *United States v. Adamant Co., et al.* (C. C. A. 9th, 1952) (197 F. 2d 1).

It follows, as a matter of law, that whatever interest appellant may have had in any of the property seized by the government in the Evaluation Proceeding was terminated on the effective date of the seizure and that ap-

pellant's rights were thereafter relegated to the fund which stood for the condemned property.

Appellant appeared, as above stated, in the Evaluation Proceeding as a defendant and the judgment by Judge Beaumont was submitted to his counsel for approval as to form [R. p. 142]. Thereafter appellant appeared as a claimant in the distribution proceeding before Judge Westover and subsequently appealed from Judge Westover's judgment [R. pp. 146-148] to this Court. *United States v. Adamant Co. et al., supra*. Although appellant contested the amount to be distributed to the appellee, Treasure Company, in these proceedings, he did not once contest the validity of the assignment by the appellee, Treasure Company, of its interest in the condemnation award to the appellee, Reconstruction Finance Corporation. This assignment was held valid by both the District Court and by this Court and the issue of its validity is also *res judicata*.

Appellant's Opening Brief is replete with allegations of fraud. These allegations for the most part are premised on the assumption that interests in real property were transferred from the appellee, Treasure Company, to the appellee, Reconstruction Finance Corporation, under the terms of the contract which is under attack. The assumption is not correct.

Conclusion.

The subject suit was properly removed from the State Court to the District Court and the Motion of Appellant to Remand the Cause to the State Court was properly overruled.

The Order Granting Motion for Partial Summary Judgment in favor of appellees was properly entered by the District Court but such order is not a final disposition of the controversy, is not appealable, and is not properly before this Court at this time.

Respectfully submitted,

JOHN H. RICE, and

NICHOLAS & MACK,

Attorneys for Appellees, Reconstruction Finance Corporation, Treasure Company, Samarkand Oil Co., Empire Oil Company, Trust Oil Company, Southern California Gas Company and G. de Bretteville.

No. 13946.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HARRY WYNN,

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION, TREASURE
COMPANY, SAMARKAND OIL COMPANY, EMPIRE OIL
COMPANY, TRUST OIL COMPANY, and SOUTHERN
CALIFORNIA GAS COMPANY and G. DE BRETTEVILLE,

Appellees.

REPLY BRIEF OF APPELLANT
HARRY WYNN.

FILED

DEC 7 1953

LELAND J. ALLEN,

PAUL P. O'BRIEN

CLERK

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CALIFORNIA GAS COMPANY and G. DE BRETTEVILLE,

Appellees.

**REPLY BRIEF OF APPELLANT
HARRY WYNN.**

ARGUMENT.

The Courts Always Interpret and Declare the Legislative Intent in Construing a Statute, Especially When Such Statute Is Expressed in Simple and Unambiguous Language.

When Congress enacted the statute creating the Reconstruction Finance Corporation, *it knew* that the United States Government would own all of the capital stock.

Congress also knew that Section 1349 of Title 28 of the United States Code entitled "Corporation organized under federal law as party," was worded in the *negative* and hence conferred *in itself* no jurisdiction upon federal courts.

Congress *then* wrote into the act creating the Reconstruction Finance Corporation that it could “*sue and be sued in a state court.*”

Congress thereby declared its statutory directives that the Reconstruction Finance Corporation Was Subject to suit in the state court.

We submit that *if* appellees’ argument on pages 9 to 16 of their brief was sound, then it would be *an useless act* to sue Reconstruction Finance Corporation in any state court. The case could immediately be removed to the federal court and *thus nullify* the legislative intent as expressed by Congress, that it was subject to suit in a state court.

This State Court Complaint Discloses No Cause for Removal, Hence the Federal Court Has No Jurisdiction.

“If plaintiff’s pleading does not disclose a removable suit, the suit *may not be rendered removable* by allegations in subsequent pleadings, including the answer or plea, demurrer of defendant, or a reply; by the allegations of the petition for removal; by *evidence* of defendant; or by an order of the court on any issue tried on the merits.”

76 C. J. S., Sec. 74, p. 967.

“To bring a case within the statute, a right or immunity created by the constitution or laws of the United States *must be an element*, and an essential one, *of the plaintiff’s cause of action.* (Cases cited.) * * * and the controversy *must be disclosed* upon the *face* of the complaint; *unaided* by the answer or

by the petition for removal.” (Cases cited.) (Emphasis added.)

Gully v. First National Bank, 57 S. Ct. 96, 299 U. S. 109, 81 L. Ed. 70.

“(282) The obvious principle of these decisions is that, in the absence of a fraudulent purpose to defeat removal, the plaintiff may, by the *allegations* of his *complaint*, *determine* the *status* with respect to removability of a case *arising under a law of the United States*, when it is commenced, and that this power to determine the removability of his case *continues* with the plaintiff throughout the litigation, so that whether such a case, *non-removable when commenced*, shall afterwards become removable, depends *not upon* what the defendant *may allege* or *prove*, or *what the court may*, after hearing upon the merits, *in invitum*, *order*, but *solely* upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion.

The result of the application of this principle to the case at bar is not doubtful.

The plaintiff did not at any time admit that he had failed to prove the allegation that the deceased was employed in interstate commerce when injured, and he did not amend his complaint, but, on the contrary, he has contended at every stage of the case, and in his brief in this court still contends, that the allegation was supported by the evidence. The first holding to the contrary was by the state supreme court; and the most that can be said of that decision is that the defendant prevailed in a matter of defense which he had pleaded; but, as we have seen, this does not convert a non-removable case into a re-

movable one, in the absence of voluntary action on the part of the plaintiff, and it therefore results that the defendant *did not* at any time have the right to remove the case to the Federal court, which it claims was denied to it, and that therefore, there being no substance in the claim of denial of Federal right, this court is without jurisdiction to review the decision of the Supreme Court of Montana, and the writ of error must be dismissed." (Emphasis added.)

Great Northern Railway Company v. J. C. Alexander, 38 S. Ct. 237, 246 U. S. 276-282, 62 L. Ed. 713.

"(8) But it is equally well settled that, where there is no claim of a fraudulent attempt to evade a removal, a case not removable when commenced cannot be converted into a removable one by evidence of the defendant or by an order of the court upon an issue *on the merits*; but can only be accomplished by the voluntary action of the plaintiff. *Great Northern Railway Co. v. Alexander*, 246 U. S. 276, 281, 38 S. Ct. 237, 62 L. Ed. 713; *Southern Ry. Co. v. Lloyd*, 239 U. S. 496, 500, 36 S. Ct. 210, 60 L. Ed. 402; *American Car & Foundry Co. v. Kittelake*, 236 U. S. 311, 315, 316, 35 S. Ct. 355, 59 L. Ed. 594; *Whitcomb v. Smithson*, 175 U. S. 635, 637, 20 S. Ct. 248, 44 L. Ed. 303; *Kansas City Suburban, etc. v. Herman*, 187 U. S. 63, 70, 23 S. Ct. 24, 47 L. Ed. 76; *Lathrop, Shea & Henwood Co. v. Interior Constr'n Co.*, 215 U. S. 246, 251, 30 S. Ct. 76, 54 L. Ed. 177; *Alabama Great Southern R. Co. v. Thompson*, 200 U. S. 206, 26 S. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147."

Halsey v. Minnesota-South Carolina Land & Timber Co., 54 F. 2d 933, p. 935.

Whether a Suit Arising Under a Law of the United States Is Within the District Court's Jurisdiction Must Appear From Plaintiff's Pleading, Not the Defenses Which May Be Interposed to, or Anticipated by It.

The above ruling was made in the following cases:

Peyton v. Railway Express Agency, 316 U. S. 350, 62 S. Ct. 1171, 86 L. Ed. 1525;

Tennessee v. Union & Planters Bank, 152 U. S. 454, 14 S. Ct. 654, 38 L. Ed. 511;

Louisville & N. R. R. v. Mottley, 211 U. S. 149, 29 S. Ct. 42, 53 L. Ed. 126;

Gully v. First National Bank, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed. 70;

Federal Savings & Loan Insurance Corporation v. Third National Bank, 60 Fed. Supp. 110-116.

In the case at bar, appellees claim federal jurisdiction *because of their defense* of a condemnation judgment.

This is an erroneous ruling and an erroneous claim.

Had the Plaintiff, Harry Wynn, Brought This Action in the Federal Court, the Five California Corporations and the One Individual (These Defendants) Would Have Removed the Case to the State Courts as a Matter of Jurisdiction.

Machine Tool & Equipment Corporation v. Reconstruction Finance Corporation, 131 F. 2d 547 (cited by appellees at page 10 of brief) was the *sole* defendant in that case, *hence* it has *no application* here.

In *Sabin v. Home Owners Loan Corporation*, 147 F. 2d 653 (Appellees' Br. p. 10)—the only defendants which

the trial court allowed to remain in the case as party litigants were the sheriff and the owner of the transfer and storage company, both of whom acted as agents of the Home Owners Loan Corporation and *under the directions* of said Home Owners Loan Corporation in enforcing its judgment.

They were not separate and individual party litigants as in the case at bar.

“It is also well settled that statutes relating to the jurisdiction of United States Courts are to be strictly construed. *Elgin v. Marschall*, 106 U. S. 578; *Grace v. American Central Ins. Co.*, 109 U. S. 278; *Healy v. Ratta*, 292 U. S. 263.”

* * * * *

“The matter of jurisdiction of the district courts of the United States is not to be considered a special privilege *conferred upon Governmental agencies* or others, and jurisdictional statutes are not to be construed *in any protective sense*.

“Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined. *Healy v. Ratta*, 292 U. S. 263, 54 S. Ct. 700, 703, 78 L. Ed. 1248.”

Federal Savings & Loan Insurance Corporation v. Third National Bank, 60 Fed. Supp. 110-114.

Appellees Ended Their Quotation (Br. p. 9, From 14 A. L. R. 2d p. 1020), Short of the Law Applicable to the Case at Bar.

At page 1022 of 14 A. L. R. the same quoted article states as follows:

“The purpose of the 1925 Act was not to enlarge, but to limit, Federal jurisdiction. If a cause is not otherwise removable because of defect of parties defendant seeking removal in actions involving multiple defendants, the 1925 statute does *not make* the action removable at the behest of *only one* defendant merely because it is a Federal corporation of which the United States owns more than one-half the capital stock.”

14 A. L. R. 2d, pp. 1022-1023.

We quote from *Belcher v. Actna Life Ins. Co., et al.*, 3 Fed. Supp. 809, p. 811:

“The court has been unable to find, and counsel for the removing defendant, although filing a most admirable and forceful brief, has failed to cite, any case which would indicate that defendant in this case is excepted from this general rule. Counsel contends, however, that the proviso contained in the latter part of the Act of February 13, 1925, indicates an intention on the part of Congress to confer an absolute federal jurisdiction in cases in which corporations of this character may be involved. The act, however, is not susceptible of this construction. *The obvious purpose of the statute is to further restrict the jurisdiction of the federal courts.* Con-

gress, having in mind the uniform holding of the courts that cases to which corporations having federal charters were parties arose under the Constitution and laws of the United States, desired to change this rule, with the proviso that the law as it then existed should remain in effect as to such corporations wherein the United States was the owner of more than one-half of the capital stock. The effect of this enactment was to leave these corporations just where other federal corporations had been before, and *not to increase* the jurisdiction of the federal courts *with regard to these corporations*.

If the Congress had intended not only to give such corporations the right to originally invoke the jurisdiction of the federal courts, but to remove every case to which they might be a party to the federal courts, without regard to the limitations provided by the removal statute, then it certainly would have used more apt and conclusive language.

It may be, as counsel very forcefully contends, that it is desirable for this federal jurisdiction to exist in the case of corporations such as this, where the record shows the government not only owns more than one-half, but all of the capital stock. If this be true, it is a matter for legislative and not judicial declaration.

“Accordingly, the motion to remand will be granted.”

Federal Incorporation Does Not Confer Federal Jurisdiction.

“The Plaintiffs’ position is that the only thing done by the Act of 1925 (and the preceding Act of January 28, 1915, Sec. 5, 38 Stat. 804) was to take away jurisdiction so far as it depended upon the existence of a constructive federal question arising from the mere fact of federal incorporation; and that, since a genuine controversy as to the interpretation of the act incorporating the American Legion is here involved, jurisdiction remains. The trouble with this is that there never has been any ground of jurisdiction of suits by or against federal corporations other than that an actual question of interpretation of the act of incorporation was involved in each case. Hence, when the acts of 1915 and 1925 eliminated federal incorporation as a ground of jurisdiction, they eliminated the only ground which had ever existed.”

Anthony Wayne Post No. 418, et al., v. American Legion, 5 Fed. Supp. 395.

In *Rhodes v. National Iron Bank of Pottstown*, 35 Fed. Supp. 650 it was held that

“A case is not deemed one ‘arising under Constitution or laws of United States or otherwise properly within Federal Courts’ jurisdiction *merely* because a party to it is incorporated under the Act of Congress.”

(N. B.: This sustains the proposition that Sec. 1349 of Title 28 of United States Code is in the negative and confers no jurisdiction.)

The District Court Did Make and Direct the Entry of a Final Judgment in so Far as the Complaint Sought Relief Against Any Property Involved in the Condemnation Action and Said Court Made an Express Determination of That Fact.

The Court (Honorable Peirson Hall) signed Findings of Fact and Conclusions of Law, fully setting forth the determination that the condemnation judgment placed the title of certain realty in the Reconstruction Finance Corporation and beyond the reach of the plaintiff in his complaint to set aside this fraudulent contract. [R. pp. 113-117.]

The Honorable Peirson Hall concluded:

“That the condemnation judgment is final—no appeal lies therefrom—the statute of limitations has run against any attempt to dispute the Government’s possession.

Whatever interest plaintiff (Wynn) had was terminated by operation of law on October 26, 1942, the effective date of seizure.

The validity of Treasure Company’s assignment to Reconstruction Finance Corporation cannot be contested and is *res judicata*.

Said assignment is not a transfer in fraud of creditors.’ [R. pp. 117-118.]

Judge Hall expressed a final determination of the issues, as follows:

“If all the property described in paragraph II of plaintiff’s complaint were the subject of the condemnation proceeding, No. 2454-B of this Court, *then it*

would seem to me that the defendants' motion for summary judgment should be granted.

* * * * *

"Thus there is *no* genuine issue as to any material fact concerning *that* portion of the property." [R. p. 109.]

If this Court believes that the partial summary judgment *means what it says*, then this Court should determine this appeal and thus avoid prolonged litigation and another appeal on the same point *now* involved.

If there is a technical point involved under Rule 56(d) then this Court can easily make the same ruling as was done in *Kaufman & Ruderman v. Cohn & Rosenberger*, C. A. N. Y., 1949, 177 Fed. 2d 849, as follows:

"Where order of federal district court dismissing one of two causes of action was affirmed, and it was subsequently contended that the Order was not appealable because the district judge did not make an express determination that there was no just reason for delay, Court of Appeals would allow district judge 10 days in which to make such an express determination which would be treated as made *nunc pro tunc*."

Appellant is satisfied that Judge Hall has finally ruled and determined that the partial summary judgment is final and bespeaks his final decision on that matter thus involved.

There Is a Genuine Issue of Material Fact With Respect to Property Rights Contrary to the Assumption of Appellees at Page 27 of Their Brief.

The appellees are relying upon a condemnation judgment which was made *before* this fraudulent contract came into existence.

Reconstruction Finance Corporation knowing full well that the evidence in Reconstruction Finance Corporation's jury trial distinctly obligated Treasure Company *before* making any assignment of this leasehold to submit a copy of said assignment to the California Corporation Commissioner, so he could make the usual orders protecting the royalty holders, and knowing full well of the royalty holders' claims of \$96,543.35 against this leasehold for unpaid royalty income, nevertheless Reconstruction Finance Corporation took a full assignment of these property rights and agreed to and did pay \$150,000.00 to corporations and persons designated by de Bretteville and his corporations *without* the approval of the California Corporation Commissioner.

We submit that there is a genuine issue of *knowledgeable fraud* against the Reconstruction Finance Corporation.

Conclusion.

The complaint in the case at bar discloses no cause for removal to the Federal court.

The question of jurisdiction can always be raised at any stage of the proceedings.

Congress created the Reconstruction Finance Corporation and provided that it could be sued in the state courts.

Federal incorporation does not confer federal jurisdiction.

The district court made an expressed and final determination in its summary judgment, and said judgment should be reviewed by this appeals court even if a *nunc pro tunc* order is required of the trial court.

There is a genuine issue of the Reconstruction Finance Corporation entering into a fraudulent transfer of assets to it by a debtor wishing to defraud his creditors.

Respectfully submitted,

LELAND J. ALLEN,

Attorney for Appellant Harry Wynn

United States
Court of Appeals
For the Ninth Circuit.

LEO WING ON and LEO WING WAH,
Appellants,
vs.

J. HOWARD McGRATH, Attorney General of
the United States,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California
Southern Division.

FILED

OCT 23 1953



No. 13969

United States
Court of Appeals
For the Ninth Circuit.

LEO WING ON and LEO WING WAH,
Appellants,
vs.

J. HOWARD McGRATH, Attorney General of
the United States,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

SALVATORE C. J. FUSCO, ESQ.,
835 Clay St., San Francisco 8, Calif.,
For Appellant.

LLOYD H. BURKE, ESQ.,
United States Attorney;
CHARLES ELMER COLLETT, ESQ.,
Assistant United States Attorney,
San Francisco, California,
For Appellee.

In the District Court of the United States, Northern
District of California, Central Division

No. 31,316-Civil

LEO WING ON and LEO WING WAH,
Plaintiffs,

vs.

HERBERT BROWNELL, JR., Attorney General
of the United States,
Defendant.

EXCERPT FROM DOCKET ENTRIES

1952

Mar. 4—Filed petition for declaratory judgment—
issued 2 summons.

May 13—Filed answer of defendant.

Dec. 12—Filed notice by plttf. of motion to substi-
tute party deft. Dec. 29, 1952.

Dec. 12—Filed motion by plttf. to substitute party
deft.

Dec. 29—Ord. motion to substitute party deft.
cont'd to Jan. 12, 1953. (Harris.)

1953

Jan. 20—Filed order granting motion of plaintiff
to substitute party defendant. (Harris.)

Jan. 26—Filed notice and motion by deft. for re-
hearing Jan. 26, 1953.

Jan. 26—Ord. motion for rehearing cont'd to Jan.
27, 1953. (Harris.)

Jan. 27—Ord. motion for rehearing cont'd to Feb.
3, 1953. (Harris.)

1953

- Feb. 24—Filed ord. denying motion of deft. for reconsideration. (Harris.)
- Mar. 2—Ord. for trial May 12, 1953. (Harris.)
- Mar. 18—Filed notice and motion by plaintiff to substitute defendant March 23, 1953.
- Mar. 30—Filed order substituting Herbert Brownell, Jr., as defendant. (Murphy.)
- May 25—Filed notice and motion by defendant to dismiss, June 1, 1953.
- June 3—Filed order granting motion of defendant to dismiss. (Murphy.)
- June 9—Filed notice and motion by plttf. for rehearing, June 15, 1953, with supporting memo.
- June 17—Filed order denying motion for rehearing. (Murphy.)
- July 14—Filed notice and motion by plaintiff to set for trial, July 20, 1953, with certificate of readiness and memo. in support.
- July 20—Ordered, motion to set for trial denied. (Carter.)
- July 22—Filed notice of appeal.
- July 22—Filed designation of record on appeal.
- July 22—Filed appeal bond in sum of \$250.00.

In the District Court of the United States, Northern
District of California, Central Division

No. 31,316

LEO WING ON and LEO WING WAH,
Plaintiffs,

vs.

J. HOWARD McGRATH, Attorney General of
the United States, Washington, D. C.,
Defendant.

COMPLAINT

Comes now the plaintiffs in the above-entitled action, and for their cause of action against the defendant herein, alleges as follows:

I.

That the defendant herein above named is and has been at all times herein mentioned the Attorney General of the United States at Washington, D. C., and as such is the head of the United States Department of Justice.

II.

That plaintiffs have been, and at all times herein stated, are still being held in restraint and being denied their liberty by the defendant in that the plaintiffs are confined to the Immigration Detention Quarters at San Pedro, California, and further that the defendant has ordered the plaintiffs to be deported from the United States as aliens.

III.

That the plaintiffs' father, Lee Chee Ting, is a

citizen and national of the United States and is now a resident of the City and County of San Francisco, California, and further that the plaintiff Leo Wing On was born on March 1, 1929, in the City of Canton, China; and that the plaintiff Leo Wing Wah was born on September 15, 1932, in the City of Canton, China; and that both of the plaintiffs herein are the natural and legitimate sons of the above-named Lee Chee Ting and further that the plaintiffs are citizens and nationals of the United States by virtue of the provisions of Revised Statutes 1993, as amended, and further that the plaintiffs are residents of the City and County of San Francisco, State of California, but are presently residing in the City of San Pedro, County of Los Angeles, California.

IV.

That plaintiffs claim a right and privilege as nationals and citizens of the United States and further claim the attending rights and privileges to enter and remain in the United States and to enjoy all pertinent rights and privileges therein, and further that plaintiff alleges that defendant herein named has denied and still continues to deny said rights and privileges to the plaintiffs and that the executory officials of the Department of said defendant have denied and continue to deny the plaintiffs such rights and privileges as nationals and citizens upon the grounds that the plaintiffs herein named are not nationals and citizens of the United States.

V.

That the plaintiffs have prosecuted this action pursuant to provisions of Section 503 of the Nationality Act of 1940 for a judgment declaring the plaintiffs to be nationals of the United States.

Wherefore, plaintiffs pray:

1. That the defendant herein or other proper representatives, agents or officials of the United States government be requested to appear and answer this complaint.

2. That a time and date be set for hearing the evidence to be adduced on behalf of plaintiffs and their witnesses.

3. That pending the hearing and determination of this action, the plaintiffs be released from the custody of the Immigration and Naturalization Service and of the defendant and that plaintiffs be allowed to remain in the custody of their father herein named under reasonable bond.

4. For a judgment of this Honorable Court declaring the plaintiffs to be nationals of the United States.

5. For such other and further relief as may be meet and just in the premises.

(Chinese signature)

LEO WING ON,

(Chinese signature)

LEO WING WAH.

/s/ SALVATORE C. J. FUSCO,

Attorney for Plaintiffs.

State of California,
County of Los Angeles—ss.

Leo Wing On and Leo Wing Wah, being first duly sworn, each depose and say:

That they are the plaintiffs named in the foregoing Complaint; that they have read said complaint and know the contents thereof; that the same is true of their own knowledge except as to the matters which are therein stated on information and belief and as to those matters they believe it to be true.

(Chinese signature)

LEO WING ON,

(Chinese signature)

LEO WING WAH.

Subscribed and sworn to before me this 4th day of March, 1952.

[Seal] /s/ CRICHTON K. LEONG,
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires June 9, 1952.

[Endorsed]: Filed March 4, 1952.

[Title of District Court and Cause.]

ANSWER

Comes Now J. Howard McGrath, Attorney General of the United States of America, defendant in the above-entitled action, by and through his attorneys, Chauncey Tramutolo, United States Attorney, and Edgar R. Bonsall, Assistant United States Attorney, and in answer to plaintiffs' complaint admits, denies, and alleges as follows:

I.

Answering Paragraph I of the Complaint, defendant admits the allegations contained therein.

II.

Answering Paragraph II of the Complaint, defendant admits that the plaintiffs were detained by the Immigration and Naturalization Service, Department of Justice, at the Port of San Francisco, restrained from entering the United States, and are at present detained at the Immigration Detention Quarters, at San Pedro, California. Defendant further admits that the plaintiffs have been ordered returned to the country from whence they came.

III.

Answering Paragraph III of the Complaint, defendant denies the allegations contained therein and specifically denies as follows: That Lee Chee Ting is the blood father of the plaintiffs, but admits that one Lee Chee Ting has been recognized as a citizen

and national of the United States and resides in the City and County of San Francisco, California. Denies the plaintiff, Leo Wing On, was born on March 1, 1929, in the City of Canton, China, and that plaintiff, Leo Wing Wah, was born on September 15, 1932, in the City of Canton, China. Denies that the plaintiffs are the natural and legitimate sons of Lee Chee Ting; denies that plaintiffs are citizens of the United States by reason of Section 1993 of the revised Statutes of the United States as amended, or under any other statute, and affirmatively asserts that the plaintiffs are not now and never have been citizens of the United States. Defendant further denies that the plaintiffs are presently residing in the City of San Pedro, County of Los Angeles, California, and affirmatively asserts that plaintiffs have no lawful domicile in the State of California, or elsewhere in the United States.

IV.

Answering Paragraph IV of the Complaint, defendant admits that the plaintiffs have been denied the rights and privileges to enter and remain in the United States and to enjoy all pertinent rights and privileges therein, but affirmatively alleges plaintiffs have no rights or privileges as nationals of the United States, as they are not now and never have been citizens of the United States, but are in fact aliens.

V.

Answering Paragraph V of the Complaint, defendant denies the allegations contained in Para-

graph V and affirmatively alleges that the plaintiffs do not have a cause of action against the defendant, pursuant to the provisions of Section 503 of the Nationality Act of 1940 as amended.

Wherefore, defendant prays that the Complaint herein be dismissed; that the relief prayed for be denied; and that defendant recover from plaintiffs his proper costs herein.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney;

/s/ EDGAR R. BONSALE,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed May 13, 1952.

[Title of District Court and Cause.]

SUPPLEMENTAL PLEADING AND MOTION
TO SUBSTITUTE PARTY DEFENDANT
UNDER RULE 25 (d) R.C.P.

Plaintiffs, Leo Wing On and Leo Wing Wah, pursuant to the provision of Rule 25 (d) of the Federal Rules of Procedure, in the above-entitled cause of action move this Court for an order substituting James P. McGranery as Attorney General of the United States as a party defendant herein in his said representative capacity in the place and stead of his predecessor in said public office, J. Howard McGrath, who during his period of

office was named as party defendant in his representative capacity as Attorney General of the United States and further in order to show to the satisfaction of this Court that there is a substantial need for the continuance and maintenance of this action against the said defendant and his agents under his authority against whom this proceeding was instituted the plaintiffs herein set forth and allege as follows:

1. James P. McGranery heretofore was appointed Attorney General of the United States and on May 27, 1952, took oath of office as Attorney General of the United States and thereupon commenced the performance of his duties as such public officer and since then holds and at present does hold said public office; is the successor in said public office to his predecessor, J. Howard McGrath, who has been named as party defendant in the above-entitled action and that James P. McGranery as Attorney General of the United States is a real party in interest and a necessary and indispensable party defendant in this cause of action as provided for by Code Section 503 of the Nationality Act of 1940.

Wherefore, plaintiffs pray for an order of this Court substituting James P. McGranery in his representative capacity as Attorney General of the United States in the place and stead of his predecessor, J. Howard McGrath, in that said capacity.

/s/ SALVATORE C. J. FUSCO,
Attorney for Plaintiffs.

[Endorsed]: Filed December 12, 1952.

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO SUB-
STITUTE PARTY DEFENDANT

Plaintiffs have moved the Court for substitution of now Attorney General James P. McGranery, successor to J. Howard McGrath. Defendant contends that plaintiffs have not filed timely, in accordance with the requirements of Federal Rules of Civil Procedure 25 (d) and that the cause of action must be declared abated.

In an action against a federal official in which plaintiff seeks to compel such official to discharge his duties, the action abates when the official dies or retires from office. But the instant action seeks declaratory relief, namely, a finding of nationality statuts of plaintiffs. Thus the language of Judge Goodman in *Ly Moon and Ly Sue Ning v. Acheson*, Nos. 30159, 31161, is applicable: “* * * despite the fact that the Secretary of State (in this instance Attorney General) is party defendant, in every sense the people of the United States (the United States of America) are defendants.”

The Attorney General is named as the representative of the United States government. Substitution of party defendants is one of form and not of substance.

Accordingly, It Is Ordered that the motion to

substitute party defendant be, and the same hereby is, Granted.

Dated: January 19, 1953.

/s/ GEORGE B. HARRIS,
United States District Judge.

Defense Corp. v. Lawrence Co.,
336 U.S. 631.

[Endorsed]: Filed January 20, 1953.

[Title of District Court and Cause.]

MOTION FOR REHEARING

On January 19, 1953, this Court ordered that the motion of plaintiffs to substitute former Attorney General James P. McGranery, successor to J. Howard McGrath, as party defendant herein, be granted. In its order the Court relied on the language found at page 5 in the opinion of Judge Louis E. Goodman dated January 12, 1953, in the cases of *Ly Shew vs. Acheson*, Civil Nos. 30159 and 31161, and further relied on the case of *Defense Corp. v. Lawrence Co.*, 336 U.S. 631.

Now comes the defendant and moves for rehearing on the following grounds:

1. Congress of the United States has by statute, 8 U.S.C. 903, permitting the filing of the above suit.
2. Rule 25 (d) of Federal Rules of Civil Procedure specifically provides the time and manner in

which substitution of parties may be made, and Rule 6 (b) does not permit an extension of time.

3. The Supreme Court of the United States in *Snyder v. Buck*, 340 U.S. 15, held in a parallel matter that an action abated for failure to substitute defendant within the prescribed period.

4. This Court, in the case of *Toshio Joji*, Civil No. 27557, granted on April 26, 1951, a motion to dismiss for failure to substitute the Attorney General of the United States as defendant in place of the Alien Property Custodian, pursuant to the provisions of Rule 25 (d), Federal Rules of Civil Procedure.

5. The United States of America has not consented to be sued in such an action as is alleged in plaintiffs' complaint.

Dated: January 23, 1953.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

NOTICE OF MOTION

To Plaintiffs Above Named and Salvatore C. J. Fusco, 538 Front Street, San Francisco, California, His Attorney:

Please Take Notice that the undersigned will bring the attached Motion for Rehearing on for hearing before the above-entitled Court, at Room 276, Post Office Building, 7th and Mission Streets,

City and County of San Francisco, California, on the 26th day of January, 1953, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 26, 1953.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR RECONSIDERATION

The Court previously made its order granting plaintiffs' motion to substitute party defendant. Thereafter defendant moved the Court to reconsider its ruling. The Court heard arguments and reviewed the authorities, including those submitted in the like case of *Lew Sheck Shan, et al., v. McGrath*, No. 30127.

The Court now being fully advised, It Is Ordered that defendant's motion for reconsideration be, and the same hereby is, Denied.

It Is Further Ordered that plaintiffs' motion to substitute party defendant be, and the same hereby is, Confirmed.

Dated: February 24, 1953.

/s/ GEORGE B. HARRIS,
United States District Judge.

Fleming v. Goodwin,
165 F. 2d 334;

Fleming v. People's Natural Gas Co.,
8 F.R.D. 42;

F.R.C.P. 6 (b).

[Endorsed]: Filed February 24, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Defendant Above Named and the United States Attorney, C. Tramutolo, and Edgar R. Bonsall, Assistant United States Attorney, Post Office Building, San Francisco, California, and His Attorney:

Please take notice that on Monday, March 23, 1953, at the hour of 9:30 a.m. or as soon thereafter as the matter can be heard in the Law and Motion Department, United States District Court, Post Office Building, Seventh and Mission Streets, San Francisco, the attorney for the plaintiff will present a motion for substitution of party defendant.

The copy of this motion is attached herewith and made a part thereof.

/s/ SALVATORE C. J. FUSCO,
Attorney for Plaintiffs.

[Title of District Court and Cause.]

MOTION FOR SUBSTITUTION OF
PARTY DEFENDANT

Comes now the Plaintiff in the above-entitled action by and through counsel of record and moves this Court for an order substituting Herbert Brownell, Jr., as Attorney General of the United States in the place and stead of the defendant, James P. McGranery, as Attorney General.

Said motion being filed pursuant to the provision of Rule 25 of the Federal Rule of Civil Procedure.

/s/ SALVATORE C. J. FUSCO,
Attorney for Plaintiffs.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 18, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF SALVATORE C. J. FUSCO
IN SUPPORT OF MOTION TO SUBSTI-
TUTE PARTY DEFENDANT

Salvatore C. J. Fusco, being first duly sworn, deposes and says:

1. He is the attorney for the plaintiffs in the above-entitled action and that James P. McGranery, defendant in the above-entitled action, resigned from his office as Attorney General, and that Her-

bert Brownell, Jr., was duly appointed as Attorney General in the place and stead of the defendant, James P. McGranery, on or about January 21, 1953, and that Herbert Brownell, Jr., has entered upon the duties of said office on or about January 21, 1953, and as such holds said office.

2. There is substantial need for continuing and maintaining said cause of action and obtaining adjudication of the question involved for the reason that the executing official of the Department of State has refused to recognize said plaintiffs' claim of United States nationality.

3. Your affiant is informed and on such information and belief states that Herbert Brownell, Jr., as Attorney General by and through his subordinate official will continue to deny the said plaintiffs' claim of United States nationality.

/s/ SALVATORE C. J. FUSCO,
Attorney for Plaintiffs.

Subscribed and sworn to before me this 16th day of March, 1953.

[Seal] /s/ JAMES R. HUNT,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires Jan. 27, 1957.

[Endorsed]: Filed March 18, 1953.

[Title of District Court and Cause.]

ORDER SUBSTITUTING PARTY
DEFENDANT

The motion for substitution of party defendant in this cause coming on to be heard before the Court, and the Court being fully advised in the premises, and it appears that the defendant, James P. McGranery, Attorney General of the United States, has been replaced by Herbert Brownell, Jr., as Attorney General, it is by this Court the 30th day of March, 1953, hereby ordered that Herbert Brownell, Jr., as Attorney General, be and he is hereby substituted as party defendant in this cause in the place and stead of James P. McGranery, as Attorney General.

/s/ EDWARD P. MURPHY,
Judge of the District Court.

[Endorsed]: Filed March 30, 1953.

[Title of District Court and Cause.]

DEFENDANT'S MOTION TO DISMISS
COMPLAINT

Comes Now the defendant and moves the Court for a dismissal on the following grounds:

1. The Court lacks jurisdiction over the subject matter, in that the action has abated;
2. The Court lacks jurisdiction over the person

of Herbert Brownell, Jr., Attorney General of the United States.

Wherefore, defendant prays that the complaint on file in the above action be dismissed.

/s/ LLOYD H. BURKE,

United States Attorney;

By /s/ CHARLES ELMER COLLETT,

Assistant U. S. Attorney,

Attorneys for Defendant.

NOTICE OF MOTION TO DISMISS
COMPLAINT

To Plaintiffs Above Named, and to Salvatore C. J. Fusco, Esq., 835 Clay Street, San Francisco, California, Their Attorney:

Please Take Notice that on Monday, June 1, 1953, at the hour of 10:00 a.m., or as soon thereafter as the matter can be heard in the Law and Motion Department, United States District Court, 7th and Mission Streets, San Francisco, California, the counsel for defendant will bring the attached Motion to Dismiss the Complaint on for hearing before the above-mentioned Court.

/s/ LLOYD H. BURKE,

United States Attorney;

By /s/ CHARLES ELMER COLLETT,

Assistant U. S. Attorney,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 25, 1953.

In the United States District Court for the Northern
District of California, Southern Division

No. 31,316

LEO WING ON and LEO WING WAH,
Plaintiffs,
vs.

HERBERT BROWNELL, JR., Attorney General
of the United States, Washington, D. C.,
Defendant.

ORDER

Defendant's motion to dismiss has come on regularly for hearing and has been submitted.

On January 19, 1953, this Court, per Harris, J., granted plaintiffs' motion to substitute the Honorable James P. McGranery for the Honorable J. Howard McGrath as the party defendant even though more than six months had elapsed between Mr. McGrath's leaving office and the date of plaintiffs' motion. Thereafter, on March 30, 1953, upon plaintiffs' timely motion, I ordered the substitution of the Honorable Herbert Brownell, Jr., for the Honorable James P. McGranery as party defendant.

The six months' period during which a motion for substitution may be filed is jurisdictional. Rule 25 (d), F.R.C.P.; *Snyder v. Buck*, 340 U.S. 15 (1950). Accordingly, the order of this Court entered in this cause on January 19, 1953, is hereby vacated. As Mr. McGranery was never properly a

defendant in this cause, the order of this Court entered on March 30, 1953, is also vacated. Defendant's motion to dismiss is granted and the complaint is dismissed. *Bowles v. Wilke*, 175 F. 2d 35 (7th Cir., 1949).

So Ordered.

Dated: June 3, 1953.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed June 3, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Defendant Above Named and the United States Attorney, Lloyd H. Burke, and Edgar R. Bonsall, Assistant United States Attorney, Post Office Building, San Francisco, California, and His Attorney:

Please take notice that on Monday, 15 June, 1953, at the hour of 9:30 a.m. or as soon thereafter as the matter can be heard, in the Law and Motion Department, United States District Court, Post Office Building, Seventh and Mission Streets, San Francisco, the attorneys for the plaintiffs will present a motion for rehearing.

The copy of this motion is attached herewith and made a part thereof.

/s/ SALVATORE C. J. FUSCO,
Attorney for Plaintiffs.

[Title of District Court and Cause.]

MOTION FOR REHEARING

On February 24, 1953, the Honorable Judge George B. Harris granted plaintiffs' motion to substitute Herbert Brownell, Jr., for J. Howard McGrath as party defendant in the above-entitled action.

On June 2, 1953, this Honorable Court vacated the above order granting the plaintiffs' motion of substitution and granted defendant's motion to dismiss the complaint. In its order the Court relied on Rule 25(d) F.R.C.P., *Snyder vs. Buck*, 340 U. S. 15, and *Bowles vs. Wilke*, 175 F. 2d 35.

Now come the plaintiffs and move this Honorable Court for rehearing on the following grounds:

I.

Congress of the United States has by statute, 8 U.S.C. 903, permitted the filing of the above suit.

II.

The language of the Court in the case of *Fleming vs. Goodwin*, 165 F. 2d, 334 clearly explains the purpose of Section 25(d) of the Federal Rules of Civil Procedure, as applicable to actions which are

of such a nature that they will abate on separation of the offices involved from office.

III.

The nature of the case in the above action is one that does not come within the purview of 25(d) and does not abate upon the separation of J. Howard McGrath, in his nominal capacity, as Attorney General, as in contra distinction to the case of *Snyder vs. Buck*, 340 U.S. 15, calling for a duty highly personal in nature required of the defendant.

IV.

The case of *Ishikawa vs. Acheson*, Secretary of State, 90 F. Supp. 713 held that an action against the Secretary of State in his official capacity for declaratory judgment as to plaintiff's citizenship was a suit against the United States, and further held that the doctrine of laches is not applicable against the United States whether the United States is the party plaintiff or in the position of a defendant.

Federal Rules of Civil Procedure made for the conduct of private litigation should not apply and bar a full disclosure of a matter of prime importance to both the plaintiffs and the United States.

/s/ SALVATORE C. J. FUSCO,
Attorney for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed June 9, 1953.

[Title of District Court and Cause.]

ORDER

Plaintiffs' motion for reconsideration of the Court's order hereinbefore entered in this cause on June 3, 1953, has come on regularly for hearing and has been submitted.

After listening to counsel's argument and perusing his authorities, the Court sees no reason to vacate or modify its prior ruling.

So Ordered.

Dated: June 16, 1953.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed June 17, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that on this 22nd day of July, 1953, plaintiffs hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order of this Court dated on the 3rd day of June, 1953, in favor of defendant and against said plaintiffs.

/s/ SALVATORE C. J. FUSCO,
Attorney for Plaintiffs.

[Endorsed]: Filed July 22, 1953.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, the plaintiff has appealed to the United States Court of Appeals, for the Ninth Circuit from the order of this court entered June 3, 1953.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, Maryland Casualty Company, a corporation duly organized and existing under the laws of the State of Maryland, and duly authorized to transact a general surety business in the State of California, does undertake and promises on the part of the plaintiffs, to secure the payment of costs if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

It is expressly agreed by the Surety that in case of a breach of any condition hereof, he above-entitled Court, may upon notice to the Surety of not less than ten (10) days proceed summarily in the above-entitled action in which this bond is given, to ascertain the amount which the Surety is bound to pay on account of such breach and render judgment therefor against the Surety and award execution therefor, all as provided by and in accordance with the intent and meaning of rule 34 of the Rule

of Practice of the United States District Court in and for the Northern District of California.

In Witness Whereof, the corporate seal and name of the said Surety Company is hereto affixed and attested at San Francisco, California, by its duly authorized officer, this 22nd day of July, 1953.

[Seal] MARYLAND CASUALTY
COMPANY,

By /s/ W. G. KELSO,
Attorney-in-fact.

State of California,
City and County of San Francisco—ss.

On this 22nd day of July, 1953, before me, A. McClintock, a Notary Public in and for the City and County of San Francisco, personally appeared W. G. Kelso, known to me to be the Attorney-in-Fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal at my Office in the City and County of San Francisco the day and year in this Certificate first above written.

[Seal] /s/ A. McCLINTOCK,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires January 12th, 1957.

[Endorsed]: Filed July 22, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorney for the appellant:

Docket entries.

Complaint.

Answer.

Supplemental pleading and motion to substitute party defendant under rule 25(d) F.R.C.P.

Order granting motion to substitute McGranery for McGrath as party defendant.

Motion for rehearing.

Order denying motion for reconsideration.

Notice of motion and motion for substitution of party defendant.

Affidavit of Salvatore C. J. Fusco in support of motion to substitute party defendant.

Order substituting Brownell, Jr., for McGranery as party defendant.

Defendant's motion to dismiss complaint and Memo of points and authorities in support thereof.

Order granting defendant's motion to dismiss and vacating order of this Court of January 19, 1953.

Notice of motion and motion for rehearing with memo of points and authorities in support thereof.

Order denying plaintiff's motion for reconsideration.

Notice of Appeal.

Bond for costs on appeal.

Designation of record on appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 12th day of Aug., 1953.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13969. United States Court of Appeals for the Ninth Circuit. Leo Wing On and Leo Wing Wah, Appellants, vs. J. Howard McGrath, Attorney General of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 12, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals for
the Ninth Circuit

No. 13969

LEO WING ON and LEO WING WAH,
Plaintiffs,
vs.

HERBERT BROWNELL, JR., Attorney General
of the United States, Washington, D. C.,
Defendant.

STATEMENT OF POINTS

Plaintiff sets forth the following points on which he intends to rely on this appeal:

1. The court below erred in holding that the appellants' cause of action abated.
2. The court below erred in holding that the appellants' right of action abated.
3. The court below erred in vacating the order of a court of parallel jurisdiction.

Respectfully submitted,

/s/ SALVATORE C. J. FUSCO,
Attorney for Appellants.

Service of copy acknowledged.

[Endorsed]: Filed September 3, 1953.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes Now, the appellant by his attorney, Salvatore C. J. Fusco, in the above-named matter, hereby designates the entire record to be included in the transcript of record on appeal which is being considered necessary for the determination of the points on which he intends to rely on appeal.

Respectfully submitted,

/s/ SALVATORE C. J. FUSCO,
Attorney for Appellants.

Service of copy acknowledged.

[Endorsed]: Filed September 3, 1953.

No. 13,969

IN THE

United States Court of Appeals
For the Ninth Circuit

LEO WING ON and LEO WING WAH,
Appellants,

vs.

J. HOWARD McGRATH, Attorney Gen-
eral of the United States,
Appellee.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

SALVATORE C. J. FUSCO,
400 Montgomery Street, San Francisco 4, California,
Attorney for Appellants.

FILE

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PAUL P. O'BRIEN

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No. 13,969

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LEO WING ON and LEO WING WAH,
Appellants,

vs.

J. HOWARD McGRATH, Attorney Gen-
eral of the United States,
Appellee.

**Appeal from the United States District Court for the Northern
District of California, Southern Division.**

APPELLANTS' OPENING BRIEF.

This is an appeal from an order entered in the District Court, for the Northern District of California, Southern Division, on June 3, 1953, dismissing appellant's* action.

The appellant filed his complaint, seeking a declaratory judgment to determine the facts of paternity and of his United States citizenship, and which said action was commenced in accordance with the provision of Section 503 of the Nationality Act of 1940 (54 Stat. 1171, 8 U.S.C.A. 903).

*Both appellants are referred to as "appellant" throughout.

Jurisdiction of this Court to review the order of the trial Court arises by virtue of 28 U.S.C.A. 1291.

STATEMENT OF FACTS.

The appellant filed his complaint to establish the fact of paternity and of being a citizen of the United States on March 4, 1952. The appellee filed his answer to said complaint on May 13, 1952.

Thereafter, on the 11th day of December, 1952, counsel for the appellant filed a motion to substitute Herbert Brownell, Jr., in the place and stead of J. Howard McGrath as Attorney General of the United States. Whereupon the appellee filed a motion seeking to dismiss the cause and right of action on the ground that the substitution was not made timely in compliance with Rule 25 (d) of the Federal Rules of Civil Procedure. The Court, with the Hon. J. Harris sitting, heard oral argument, and examined written briefs, which were submitted by both appellee and appellant, and issued an order, allowing the appellant's motion to substitute the named Attorney General, as prayed for in appellant's motion on January 19, 1953.

Appellant thereafter set this action for trial, by the consent of Court, for the 7th day of May, 1953. Thereafter, and upon request and at the instance of the appellee, a stipulation was entered into by counsel for appellant and appellee, to continue the hearing for the 20th day of July, 1953. The appellee thereupon filed a

motion to dismiss the appellant's action on the 25th day of May, 1953, on the grounds that the action abated under the Rule 25 (d) of the Federal Rules of Civil Procedure.

The Hon. Judge Murphy, after hearing argument oral and written, thereupon vacated the order of Judge Harris and dismissed appellant's action on June 3, 1953.

STATEMENT OF POINTS ON APPEAL.

(1) The Court below erred in holding that the appellant's cause of action abated;

(2) The Court below erred in holding that the appellant's right of action abated;

(3) The Court below erred in vacating the order of a court of parallel jurisdiction.

ARGUMENT.

The axiom "*actio personalis moritur cum persona*" was the prevailing influence of the common law system of jurisprudence. In the actions *ex delicto*, the cause of action and the right to bring the action both abated with the death of the plaintiff. The actions *ex contractu* did not suffer such a hard fate, but the right to bring the action only abated, and this was limited, if the nature of the relief was such that the executor or heirs might perform, if the duties or liabilities were not of a personal nature.

These seemingly harsh principles were necessary for ending litigation, at early common law, but have since been modified by statute to meet the exigencies of a later system of economy.

Lord Campbell Act, 20 and 21 Vict. C. 83.

The question involved herein to be determined is whether the true party in interest named in the plaintiff's complaint as defendant is the Sovereign United States and the Attorney General, or J. Howard McGrath, *in propria persona*.

The cases of this type and character now before this Court are clearly not *ex delicto*, and although apparently veering toward the action *ex contractu*, fall in that peculiar agreement between a sovereign and his subjects, which are *sui generis* in nature, in that they are usually a claim for rights or privileges having as their incidence the generosity of the sovereign to his subjects.

In the instant case, the remedy as asked for in the appellant's prayer, is that of determining the fact of a filial relationship to a citizen of the United States and of a consequential decree of the Court declaring the appellant to be a citizen and national of the United States. Now this distinctive remedy, sought by the appellant, can be granted only by the sovereign, the United States; and therefore the United States is the true party in interest as party defendant.

The character of appellant's pleading herein, and the caption of the pleadings are identical and compa-

able in all respects to that of the *Ly Shew* case, where Judge Goodman held:

“Although the action is brought against the Attorney General, it is in fact an action against the United States.”

Ly Shew as guardian ad litem for Ly Moon v. Dean Acheson as Secretary of State, Civil No. 30,159.

It is appellant's contention that a removal of party defendant expressly named hereinabove as party defendant would have no entry in the scope and principle of abatement, since the nature of the action is neither *ex contractu* nor *ex delicto*, and hence does not fall into the category of actions known to common law, wherein a speedy determination of litigation was a primary factor in maintaining the King's peace.

To the contrary, the counsel for the Attorney General contends that compliance with Rule 25 (d) is the sole determining factor of whether or not an action is abated, and that where the Attorney General, named *in propria persona*, and as *persona descripto*, is removed from office, the action is deemed for all purposes abated unless the substitution of party defendant is made in compliance with Rule 25 (d).

The Attorney General contends that Rule 25 (d) has not been complied with, and that the particular action should therefore be dismissed, or again the Attorney General contends that the motion of the appellant to

substitute party defendant was not made timely and that the action abated.

Appellant contends that the purpose of Rule 25 (d), Act of February 13, 1925 (28 U.S.C., Sec. 780), originally enacted in 1899, was for the purpose of avoiding the harsh results suffered by litigants, under the early common law rules of pleading, where a party to an action *ex contractu* or *ex delicto* was removed by death or other causes, and further, we are not concerned with Rule 25 (d) inasmuch as the substitution of a party under Rule 25 (d) was evolved out of the "Bill in the nature of a bill of revivor, and founded upon privity of title." Story Equity Pleading, §§ 378-380.

It is strongly urged by the appellant that we are not concerned with the question of removal of a person named as party defendant inasmuch as an examination of the caption of the appellant's complaint, will show that the defendant is named and described, to wit, "J. Howard McGrath, Attorney General of the United States, Washington, D.C., defendant."

The jurisdiction is directed to the Attorney General of the United States, and not to that particular person acting in that capacity.

8 U.S.C.A. 903, Sec. 503, Nationality Act 1940. The name therefore is mere surplusage.

The mere examination of appellant's petition, the caption, the complaint, the prayers, and the source from whence the relief and remedy shall be granted should determine the true party in interest, and the decree of the Court requires no positive action of the

Attorney General. There is no personal action, and on the contrary all that is required of the defendant Attorney General is "non-feasance".

Appellant again contends that the United States permits itself to be sued; hence it divests itself of the immunity of the sovereign, and the removal of an officer would not have the effect of abating the action.

Thompson v. United States, 103 U.S. 480;

Federal Housing Administration v. Burr, 309 U.S. 242, 249-50.

The United States District Court for Hawaii, in reviewing an action, similar in form, content, parties, pleadings and remedy, held that an action of this type was an action against the United States, and that that Sovereign granted the subject a limited jurisdiction to sue, and that the true party in interest was the United States, and that the equitable doctrine of laches did not apply.

Ishikawa v. Attorney General, 90 Fed. Supp. 713.

The appellant contends that this action is one founded upon the largess and generosity of the Sovereign and is founded upon principles of equity, and therefore the ruling in the *Ishikawa v. Attorney General* matter, following the doctrine of laches is compatible and on point in the instant action.

Appellant argues further that the need for substitution is one of form and is of no importance, with the possibility of keeping the record straight.

We are required to speak of the Attorney General of the United States only inasmuch as that is suffi-

cient to designate that particular branch of the executive office of the President of the United States. A statement of the Attorney General's name in this type of action is a humble courtesy offered to the dignified person of the office of Attorney General.

The United States District Court held in *Fleming v. Goodwin*, 165 F. (2d) 334:

“The purpose is merely to keep the record straight.”

In *contradistinction*, actions *ex delicto*, or *ex contractu*, brought against an officer or agent of the United States usually require an act *in propria persona*, to wit: the signing of a pay-check, or a release of personal property, and lastly, the most personal act of all, the signature of a judge, affixed to a judgment.

In the instant action, the Attorney General is required to do nothing. A decree of a trial Court shall determine the fact of paternity of the plaintiff, and if so, citizenship follows as a result thereof by act of Congress.

United States Revised Statutes, Section 1993.

The remaining question that appellant sets forth as an error: A judge of the District Court may vacate an interlocutory order if in the interests of justice the ends of proper relief may be best served to the parties.

Appellant does not attempt to enter into the question of the right or power of a Court of inferior jurisdiction to vacate an order of a Court of parallel jurisdiction, but rather whether or not the action of the inferior Court in the instant matter was proper under

the all prevailing circumstance to set aside an order of an inferior Court of equal jurisdiction on the identical matter. The appellee relies on *Bowles v. Wilkie*, 175 F. 2d 35, wherein the Government's motion to substitute was vacated by a Court of parallel jurisdiction, but where there were neither briefs submitted nor oral argument presented to the Court.

Bowles v. Wilkie is distinguishable from the case at bar in that the trial judge of the Court heard argument, points and authorities by both counsels for appellant and respondent and *amicus curiae*, and after hearing oral argument and pleadings, the trial Court ruled for the appellant. That further and thereafter the same questions, arguments, persons, cases and briefs were again presented and heard by the second trial Court of parallel jurisdiction and in contradistinction to the facts in the *Bowles v. Wilkie*, supra, the Court vacated the order of the prior trial Court.

Again appellant submits the doctrine of *res judicata*, or the law of the case, and in the absence of a statute these principles will not be ignored, unless there is a showing of error.

This principle was approved in *Hamilton-Brown Shoe Co. v. Wolfe Bros. & Co.*, 240 U.S. 259:

“The Supreme Court, in rendering a final decree on certiorari may rectify errors in interlocutory proceedings, et seq.”

After dismissal of appellant's action, appellant filed a motion to set for trial in a third Court of parallel jurisdiction, and after presenting a new set of facts based upon the ruling of

Sophie Pflueger v. Tom C. Clark, Civil Action
in Equity No. 47 C. 1707, U.S. Dist. Ct., N.D.
of Illinois, E.D.,

wherein there was a stipulation between counsel for plaintiff and defendants with consent of Court for a continuance, similar to the facts of appellant's case at bar; and upon a hearing after briefs were submitted and oral argument was made on the question of jurisdiction, the trial Court, Judge Carter presiding, held that it would not set aside or vacate the order of dismissal of a Court of parallel jurisdiction.

Leo Wing On v. Brownell, Civil No. 31,316,
N.D. Calif., S.D.

The appellant therefore concludes that the Sovereign United States is the true party defendant; that the axiom, "*Actio personalis moritur cum persona*," is not applicable, since the Sovereign still lives, and so does this action; that Rule 25(d) is therefore not applicable.

Further, that the order vacating the order of a Court of parallel jurisdiction was improper.

The appellant therefore submits to this Honorable Court that the order of dismissal of the trial Court be set aside.

Dated, San Francisco, California,
November 9, 1953.

Respectfully submitted,

SALVATORE C. J. FUSCO,

Attorney for Appellants.

No. 13,969

IN THE

United States Court of Appeals
For the Ninth Circuit

LEO WING ON and LEO WING WAH,
Appellants,

VS.

J. HOWARD McGRATH, Attorney Gen-
eral of the United States,
Appellee.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

BRIEF FOR APPELLEE.

FILED

FEB 4 1954

PAUL P. O'BRIEN
CLERK

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Immigration and Naturalization Service,

On the Brief.

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No. 13,969

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LEO WING ON and LEO WING WAH,
Appellants,
VS.

J. HOWARD McGRATH, Attorney Gen-
eral of the United States,
Appellee.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The appellants herein filed a petition seeking declaratory judgment of United States nationality in the United States District Court for the Northern District of California. They allege jurisdiction under the provisions of Section 503 of the Nationality Act of 1940, 8 U.S.C.A. 903.

A motion to substitute the party defendant was filed by appellants more than six months after defendant J. Howard McGrath had vacated the office of Attorney General of the United States. This motion was

granted. A motion to dismiss on the ground of abatement was filed by appellee. This motion was heard by a different District judge, who thereupon vacated the order granting the substitution and dismissed the complaint. The appeal herein is from the latter order.

Appellants assert jurisdiction in this Court under 28 U.S.C.A. 1291. The prayer of appellee's motion to dismiss asks for the dismissal of "the complaint on file in the above action." The order of the Court below granted the motion to dismiss and dismissed the complaint.

The Court's attention is first directed to whether or not the order from which appeal was taken is an appealable order.

Monge v. Smyth, C.A. 9, 1952, 198 F. 2d 749.

Hoiness v. United States, 335 U.S. 297.

United States v. State of Arizona, C.A. 9 No. 13722. Certiorari granted and reversed by the Supreme Court of the United States on December 7, 1953.

The question of the jurisdiction of the District Court to hear the claim of citizenship by an alien who has never been in the United States has been briefed in the following appeals before this Court: No. 13745, *Fong Wone Jing v. Dulles*; No. 13746, *Chow Sing v. Brownell*; and No. 13808, *Ly Shew v. Dulles*. The complaint in the above appeal (Tr. 6) discloses that appellants were born in China and claim citizenship by derivation through their alleged father. The lack of jurisdiction in this case on the same grounds as

specified in Fong Wone Jing, Ly Shew and Chow Sing is likewise asserted herein.

STATUTES AND RULES INVOLVED.

(1) Section 503 of the Nationality Act of 1940 (8 U.S.C.A. 903) provides, insofar as pertinent here:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States.”¹

(2) Rule 25(d) of the Federal Rules of Civil Procedure provides:

“When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city or other governmental agency, is a party to an ac-

¹This statute has since been repealed by the Immigration and Nationality Act of 1952 (8 U.S.C.A. 1101, et seq.) which became effective December 24, 1952. The Savings Clause Section 405(a) continues the statute in force as to suits which were on file and pending before the new Act became effective (66 Stat. 280) but would not permit the filing of such suits now.

tion and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within six months after the successor takes office it is satisfactorily shown to the Court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object."

(3) Rule 6(b) of the Federal Rules of Civil Procedure provides:

"When by these rules or by a notice given thereunder or by order of Court an act is required or allowed to be done at or within a specified time, the Court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and

(g), except to the extent and under the conditions stated in them.

(4) Title 28 U.S.C.A. 2072, Rules of Civil Procedure for District Courts, provides:

“The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the District Courts of the United States and of the District Court for the Territory of Alaska in civil actions.

“Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

“Such rules shall not take effect until they have been reported to Congress by the Chief Justice at the beginning of a regular session and until after the close of such session.

“All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.”

STATEMENT OF THE CASE.

The appellants herein are natives of China. They first arrived in the United States at San Francisco, California, on July 12, 1951, at which time they were

excluded by a Board of Special Inquiry on the ground that they are aliens and not citizens of the United States. The excluding decision of the Board of Special Inquiry was affirmed by the Commissioner of the Immigration and Naturalization Service and by the Board of Immigration Appeals. Appellants then filed the present action in the Court below under Section 503 of the Nationality Act.

On December 12, 1952, the appellants filed a motion under Rule 25(d) of the Rules of Civil Procedure to substitute James P. McGranery for J. Howard McGrath. J. Howard McGrath had vacated his office on May 27, 1952, and more than six months had elapsed before the motion to substitute was filed. The motion to substitute was granted by Judge Harris. A motion to substitute Herbert Brownell, Jr., for James P. McGranery was then filed and granted. On May 25, 1953, a motion to dismiss the complaint was filed, and was granted by Judge Murphy on June 3, 1953. In granting the motion to dismiss, the judge vacated both prior orders granting substitution of party defendant.

STATEMENT OF POINTS.

Appellants rely on the following points:

(1) The Court below erred in holding that the appellants' cause of action abated.

(2) The Court below erred in holding that the appellants' right of action abated.

(3) The Court below erred in vacating the order of a court of parallel jurisdiction.

Two issues are raised by the specifications of error.

(1) Did the action abate when the plaintiff failed to move to substitute the defendant within six months after J. Howard McGrath vacated office?

(2) Did the judge in the Court below err in vacating the prior order granting substitution and thereafter entering an order dismissing the complaint?

ARGUMENT.

I.

THE ACTIONS ABATED SIX MONTHS AFTER J. HOWARD McGRATH VACATED THE OFFICE OF ATTORNEY GENERAL AND THEREFORE THE ORDERS OF DISMISSAL WERE NOT IN ERROR.

The appellants herein filed their actions under Section 503 of the Nationality Act of 1940, 8 U.S.C. 903, which provides:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, *may institute an action against the head of such Department or agency* in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such

person claims a permanent residence for a judgment declaring him to be a national of the United States.” (Italics ours.)

Appellants were excluded by final action of the Immigration and Naturalization Service. This Service is operated under the Department of Justice, of which the Attorney General is the head. The appellants’ action was filed against J. Howard McGrath, who was then Attorney General of the United States, alleging that employees of the Department headed by the Attorney General had denied a right or privilege to the appellants, who claimed such right or privilege as nationals of the United States. Appellants contend, first, that the United States is the true party in interest; second, that jurisdiction is directed to the Attorney General of the United States, and not to that particular person acting in that capacity.

1. There has been no consent to sue the United States.

The United States of America may be sued only when consent thereto has been given. Congress has the power to prescribe the terms and conditions upon which the United States may be sued.

United States v. Sherwood, 312 U.S. 584;

United States v. U.S. Fidelity and Guaranty Co., 309 U.S. 506;

State of Minnesota v. United States, 305 U.S. 382;

Schillinger v. United States, 155 U.S. 163;

Price v. United States, 174 U.S. 373.

The sovereignty of the United States raises the presumption against its suability unless it is clearly shown.

Eastern Transp. Co. v. United States, 272 U.S. 675;

United States v. Michel, 282 U.S. 656.

There has been no consent to sue the United States under the provision of Title 8 U.S.C. 903.

Savorgnan v. United States, 338 U.S. 491.

Appellants in the above appeal and appellants in Nos. 13992, 13993 and 13994, *Wong Wing Foo, Lew Shek Shan*, and *Wong Ying v. McGrath*, have laid heavy emphasis on the 903 action as a suit against the United States. The words of Judge Goodman in *Ly Shew v. Acheson*, 110 F. Supp. 50, are quoted in both briefs.²

Page 53:

“Despite the fact that the Secretary of State is party defendant in every real sense, the people of the United States are defendants.”

Appellants have failed to understand the import of those words.

There can be no question in this Court's mind as to consent of the sovereign to be sued. *The 903 action cannot be maintained against the United States.*

²Page 5 of appellants' brief (top of page) contains a quotation purportedly from Judge Goodman's opinion in the *Ly Shew* case. Just where this sentence is to be found is not disclosed either in the brief or the opinion. The correct quotation follows above.

Judge Goodman's remark does not imply, suggest, or in any way state that the action could be maintained against the United States. He has simply pointed to the ultimate fact that the people of the United States, the citizens of the body politic, are the ones who are primarily concerned with the determination of nationality or citizenship; all of which goes to the question of jurisdiction of the District Court to entertain an action under Section 903 filed by a person, or in his behalf, who has never been in the United States.

At page 55 of the *Ly Shew* case, Judge Goodman stated:

“There is no doubt about the Congressional intent to allow any person *in the United States* to bring suit under Section 903, if any of his rights or privileges as a citizen are denied. But as to those abroad, the objective of the statute is clearly in aid of those charged with expatriation. There is not the slightest evidence that the Congress ever intended Section 903 to encompass a declaratory proceeding to determine the identity of claimants such as plaintiffs.”

The appellants herein are in the same status as plaintiffs in the *Ly Shew* case. To contend that the suit is really against the United States in effect concedes appellee's contention that the District Court was without jurisdiction in the beginning.

Quon Quon Poy v. Johnson, 273 U.S. 352.

The jurisdictional question has been briefed by appellee in the case of *Fong Wone Jing v. Dulles*, No.

13745, and *Ly Shew v. Dulles*, No. 13808, also in *Chow Sing v. Brownell*, No. 13746, all pending in this Court.

2. The action is against the Attorney General in person and not against the office.

Appellants seek to avoid compliance with Rule 25(d) of the Rules of Civil Procedure by contending that the office of the Attorney General exists separate and apart from the Attorney General in person. There is no merit to this contention.

United States ex rel. Claussen v. Curran, 276 U.S. 590;

Snyder v. Buck, 340 U.S. 15;

United States ex rel. Trinler v. Carusi, 168 F. 2d 1014, C.A. 3;

Albert Hermann Lehmann v. Acheson, C.A. 3 No. 11035, C.A. 3, July 29, 1953, order vacating judgment 206 F. 2d 592 and remanding case to the District Court with direction to dismiss the cause as abated;

Rossello v. Marshall, 12 F.R.D. 352, S.D.N.Y. Jan. 1952;

Gambardelli v. Clark, 10 F.R.D. 44, E.D. Penn. Feb. 1950.

II.

THE COURT BELOW DID NOT ERR IN VACATING THE ORDER GRANTING SUBSTITUTION AND IN ORDERING THE COMPLAINT DISMISSED.

Appellants do not question the power of the District Court to vacate an order or judgment.

Bowles v. Wilke, 175 F. 2d 35;

Messinger v. Anderson, 225 U.S. 436.

But say the remaining question is (page 8 of brief) :

“A judge of the District Court may vacate an interlocutory order if in the interests of justice the ends of proper relief may be best served to the parties.”

The point on appeal specified is:

“(3) The Court below erred in vacating the order of a Court of parallel jurisdiction.”

Appellants continue on page 8 of the brief:

“Appellant does not attempt to enter into the question of the right or power of a Court of *inferior* jurisdiction to vacate an order of a Court of *parallel* jurisdiction, but rather whether or not the action of the inferior Court in the instant matter was proper under the all prevailing circumstance to set aside an order of an *inferior* Court of *equal* jurisdiction on the identical matter.” (Emphasis ours.)

Appellee is not quite able to unscramble the foregoing, but believes that the heading of this Section II above states what appellants have in mind. The order of the Court dismissing the complaint is before this

Court, assuming it is an appealable order. If this Court reverses, the purpose of the appeal will have been accomplished. If the order is sustained, the action abated and the order allowing the substitution was error. There is no merit to the point or question or whatever it is.

CONCLUSION.

The appellee respectfully submits that the order of the Court below should be affirmed.

Dated, San Francisco, California,
February 5, 1954.

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

Attorneys for Appellee.

MILTON T. SIMMONS,

Acting District Counsel,

Immigration and Naturalization Service,

On the Brief.

No. 13,969

IN THE
United States Court of Appeals
For the Ninth Circuit

LEO WING ON and LEO WING WAH,
Appellants,

vs.

J. HOWARD McGRATH, Attorney Gen-
eral of the United States,
Appellee.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

SALVATORE C. J. FUSCO,
400 Montgomery Street, San Francisco 4, California,
Attorney for Appellants.

FILED

APR 23 1954

PAUL P. O'BRIEN
CLERK

No. 13,969

IN THE
United States Court of Appeals
For the Ninth Circuit

LEO WING ON and LEO WING WAH,
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vs.

J. HOWARD MCGRATH, Attorney Gen-
eral of the United States,
Appellee.

**Appeal from the United States District Court for the Northern
District of California, Southern Division.**

APPELLANTS' REPLY BRIEF.

The appellee in his brief has raised the question of jurisdiction (p. 2), by his contention that the federal Courts do not have jurisdiction of this case. The question of jurisdiction is now raised for the first time and was not raised in any of the District Court proceedings.

The matters of jurisdiction and abatement were brought before this Honorable Court, sitting en banc, on the 5th day of February, 1954, when the consolidated cases of *Acheson v. Furusho*, No. 13093; *Gee v.*

Acheson, No. 13712; *Ging v. McGranery*, No. 13774, and *Acheson v. Bew*, No. 14051, were argued and heard. The decision of the Court was rendered on 1 April 1954, and the Court found that the federal Courts did have jurisdiction of this action, wherein the Court held:

“It is too plain for argument that the subject matter is within the jurisdiction of the district court and our jurisdiction is clear.”

The issue in this case was the matter of abatement of causes of action, and after hearing argument, the Court concluded that substitution of parties should be granted upon motion of parties, as provided by the text of the opinion of the Court, wherein said opinion sets forth:

“In summation, also, we repeat that since a judgment rendered in a Section 903 action cannot be a command to any head of any governmental department to do anything or to refrain from doing anything, but fixes a status for the plaintiff which all persons inclusive of governmental authorities must respect, the action does not relate to the ‘discharge’, i.e., the carrying out, of any official duty.

Since the judgments obtained or which may be obtained in the instant cases would not be ineffectual, but would establish to the world whether or not the plaintiffs are United States nationals, no reason or law exists requiring their abatement simply because there has been a period when the ex-officio defendant has not been formally made a party to the action.

Undoubtedly, the federal courts have the inherent power and duty to require that cases be kept in the course of accepted and regular procedure. And, in the circumstances of the instant cases and not by reason of statute or court rule, action should be taken upon the fact that the cases themselves have not abated but, by reason of the nominal defendants' separation from office, their successors in office should be substituted and the cases, with the ex-officio defendants substituted as defendants, should proceed in the regular course of appeal in this court."

The instant case on appeal is identical in factual and in legal principle with the above cited actions.

Wherefore, appellants respectfully pray that the judgment of the District Court, dismissing the complaints on the ground that the actions have abated, be set aside and appellants be given their day in Court.

Dated, San Francisco, California,

April 19, 1954.

SALVATORE C. J. FUSCO,

Attorney for Appellants.

No. 13970

United States
Court of Appeals
for the Ninth Circuit

WONG GONG FAY,

Appellant,

vs.

HERBERT W. BROWNELL, JR., Attorney General
of the United States,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

OCT 23 1953

No. 13970

United States
Court of Appeals
for the Ninth Circuit

WONG GONG FAY,

Appellant,

vs.

HERBERT W. BROWNELL, JR., Attorney General of the United States,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

SALVATORE C. J. FUSCO, ESQ.,

835 Clay Street,

San Francisco 8, Calif.,

For Appellant.

LLOYD H. BURKE, ESQ.,

United States Attorney,

CHARLES ELMER COLLETT, ESQ.,

Assistant United States Attorney,

San Francisco, California,

For Appellee.

In the District Court of the United States, Northern
District of California, Central Division

No. 30960—Civil

WONG GONG FAY,

Plaintiff,

vs.

HERBERT BROWNELL, JR., Attorney General
of the United States,

Defendant.

EXCERPT FROM DOCKET ENTRIES

1951

Oct. 18—Filed complaint and issued summons.

Dec. 18—Filed answer of defendant.

1953

May 5—Filed supplemental answer of defendant.

May 7—Court trial.

May 8—Court trial. Judgment ordered for defendant and counsel to prepare findings of fact, conclusions of law and judgment.
(Roche.)

May 22—Filed findings of fact and conclusions of law. (Roche.)

May 22—Filed judgment for defendant without costs.

May 25—Entered judgment, mailed notices.

June 16—Filed notice of appeal by plaintiff.

June 16—Filed appellant's designation of record on appeal.

June 16—Filed appeal bond in sum \$250.00.

June 17—Mailed notices.

1953

June 10—Filed reporter's transcript of argument of
Jack Sing, Feb. 3, 1953.

July 23—Filed order extending time to docket record on appeal to Aug. 31, 1953. (Carter.)

Aug. 6—Filed reporter's transcript of proceedings
May 7 & 8, 1953.

In the District Court of the United States, Northern
District of California, Central Division

No. 30960

WONG GONG FAY,

Plaintiff,

vs.

J. HOWARD McGrath, Attorney General of the
United States, Washington, D. C.,

Defendant.

COMPLAINT

Comes now the plaintiff in the above-entitled action, and for his cause of action against the defendant herein, alleges as follows:

I.

That the defendant hereinabove named is and has been at all times herein mentioned the Attorney General of the United States at Washington, D.C., and as such is the head of the United States Department of Justice.

II.

That plaintiff has been, and at all times herein stated, is still being held in restraint and being denied his liberty by the defendant in that the plaintiff is confined to the Immigration Detention Quarters at San Francisco, California, and further that the defendant has ordered the plaintiff to be deported from the United States as an alien.

III.

That plaintiff's father, Wong Hie, is a citizen and national of the United States and is now a resident of the City and County of San Francisco, California, and further that the plaintiff was born on May 15, 1926, in Toyshan, Kwangtung, China, and that the plaintiff herein is the natural and legitimate son of the above-named Wong Hie and further that the plaintiff is a citizen and national of the United States by virtue of the provisions of Revised Statutes 1993, as amended, and further that the plaintiff is a resident of the City and County of San Francisco, California.

IV.

That plaintiff claims a right and privilege as a national and citizen of the United States and further claims the attending rights and privileges to enter and remain in the United States and to enjoy all pertinent rights and privileges therein, and further that plaintiff alleges that defendant herein named has denied and still continues to deny said rights and privileges to the plaintiff and that the

executory officials of the Department of said defendant have denied and continue to deny the plaintiff such rights and privileges as a national and citizen upon the grounds that the plaintiff herein named is not a national and citizen of the United States.

V.

That the plaintiff has prosecuted this action pursuant to provisions of Section 503 of the Nationality Act of 1940 for a judgment declaring the plaintiff to be a national of the United States.

Wherefore, plaintiff prays:

1. That the defendant herein or other proper representatives, agents or officials of the United States government be requested to appear and answer this complaint.

2. That a time and date be set for hearing the evidence to be adduced on behalf of plaintiff and his witnesses.

3. That pending the hearing and determination of this action the plaintiff be released from the custody of the Immigration and Naturalization Service and of the defendant and that plaintiff be allowed to remain in the custody of his father herein named under reasonable bond.

4. For a judgment of this honorable court declaring the plaintiff to be a national of the United States;

And for such other and further relief as may be meet and just in the premises.

(Chinese signature)

WONG GONG FAY,
Plaintiff.

/s/ SALVATORE C. J. FUSCO,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed October 18, 1951.

[Title of District Court and Cause.]

ANSWER

Comes Now J. Howard McGrath, Attorney General of the United States, defendant in the above-entitled action, by and through his attorneys, Chauncey Tramutolo, United States Attorney, and Edgar R. Bonsall, Assistant United States Attorney, and in answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

Answering Paragraph I of the Complaint, defendant admits the allegations contained in Paragraph I of the Complaint.

II.

Answering Paragraph II of the Complaint, defendant admits that he has ordered the plaintiff to be deported from the United States. Defendant

denies that plaintiff is now restrained of his liberty and affirmatively asserts that plaintiff was released under bond on October 23, 1951.

III.

Answering Paragraph III of the Complaint, defendant admits that plaintiff's alleged father Wong Hie has been recognized by the Immigration and Naturalization Service as a citizen of the United States. Defendant denies that plaintiff is the natural and legitimate son of Wong Hie or that the plaintiff is a citizen or national of the United States. Defendant affirmatively asserts that plaintiff did not derive United States citizenship or nationality under the provisions of Section 1993, United States Revised Statutes, as amended, or under any other law or statute. Defendant has no knowledge, information or belief as to the other allegations contained in Paragraph III of the Complaint and therefore denies the same.

IV.

Answering Paragraph IV of the Complaint, defendant admits the allegations contained in Paragraph IV of the Complaint but denies that plaintiff is in fact a national or a citizen of the United States or that he is entitled to any of the rights or privileges of a national or citizen of the United States.

V.

Answering Paragraph V of the Complaint, defendant admits the allegations contained therein but affirmatively asserts that plaintiff is not entitled to a judgment declaring him to be a national or citizen of the United States.

First Affirmative Defense

Defendant affirmatively asserts that plaintiff is not the blood son of Wong Hie and therefore is not a citizen of the United States.

Wherefore, defendant prays each and every relief sought by the plaintiff be denied; that this Court declare a judgment in favor of the defendant that plaintiff has never been a citizen of the United States; and that the defendant recover his proper costs against the plaintiff in this action.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,

/s/ EDGAR R. BONSTALL,
Assistant United States Attorney, Attorneys for
Defendant.

[Endorsed]: Filed December 18, 1951.

[Title of District Court and Cause.]

SUPPLEMENTAL PLEADING AND MOTION
TO SUBSTITUTE PARTY DEFENDANT
UNDER RULE 25 (d) R.C.P.

Plaintiff, Wong Gong Fay, pursuant to the provision of Rule 25 (d) of the Federal Rules of Procedure, in the above-entitled cause of action, moves this court for an order substituting James P. McGranery as Attorney General of the United States as a party defendant herein in his said representa-

tive capacity in the place and stead of his predecessor in said public office, J. Howard McGrath, who during his period of office was named as party defendant in his representative capacity as Attorney General of the United States and further in order to show to the satisfaction of this court that there is a substantial need for the continuance and maintenance of this action against the said defendant and his agents under his authority against whom his proceeding was instituted the plaintiffs herein set forth and allege as follows:

1. James P. McGranery heretofore was appointed Attorney General of the United States and on May 27, 1952, took oath of office as Attorney General of the United States and thereupon commenced the performance of his duties as such public officer and since then holds and at present does hold said public office.

2. That said James P. McGranery in his said representative capacity is the successor in said public office to his predecessor, J. Howard McGrath, who has been named as party defendant in the above-entitled action and that James P. McGranery as Attorney General of the United States is a real party in interest and a necessary and indispensable party defendant in this cause of action as provided for by Code Section 503 of the Nationality Act of 1940.

Wherefore, plaintiffs pray for an order of this court substituting James P. McGranery in his representative capacity as Attorney General of the

United States in the place and stead of his predecessor, J. Howard McGrath in that said capacity.

/s/ SALVATORE C. J. FUSCO,
Attorney for Plaintiffs.

[Endorsed]: Filed December 12, 1952.

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO SUBSTITUTE PARTY DEFENDANT

Plaintff has moved the Court for substitution of now Attorney General James P. McGranery, successor to J. Howard McGrath. Defendant contends that plaintiff has not filed timely, in accordance with the requirements of Federal Rules of Civil Procedure 25(d) and that the cause of action must be declared abated.

In an action against a federal official in which plaintiff seeks to compel such official to discharge his duties, the action abates when the official dies or retires from office. But the instant action seeks declaratory relief, namely, a finding of nationality status of plaintiff. Thus the language of Judge Goodman in *Ly Moon and Ly Sue Ning v. Acheson*, Nos. 30159, 31161, is applicable; “* * * despite the fact that the Secretary of State (in this instance Attorney General) is party defendant, in every sense the people of the United States (the United States of America) are defendants.”

The Attorney General is named as the representative of the United States government. Substitution

of party defendants is one of form and not of substance.

Accordingly, it is Ordered that the motion to substitute party defendant be, and the same hereby is, Granted.

Dated: January 19, 1953.

/s/ GEORGE B. HARRIS,
United States District Judge.

Defense Corp. v. Lawrence Co.,
336 U.S. 631.

[Endorsed]: Filed January 20, 1953.

[Title of District Court and Cause.]

MOTION FOR REHEARING

On January 19, 1953, this Court ordered that the motion of plaintiff to substitute former Attorney General James P. McGranery, successor to J. Howard McGrath, as party defendant herein, be granted. In its order the court relied on the language found at page 5 in the opinion of Judge Louis E. Goodman dated January 12, 1953, in the cases of *Ly Shew vs. Acheson*, Civil Nos. 30159 and 31161, and further relied on the case of *Defense Corp. v. Lawrence Co.*, 336 U.S. 631.

Now comes the defendant and moves for rehearing on the following grounds:

1. Congress of the United States has by statute, 8 U.S.C. 903, permitted the filing of the above suit.

2. Rule 25(d) of Federal Rules of Civil Procedure specifically provides the time and manner in which substitution of parties may be made, and Rule 6(b) does not permit an extension of time.

3. The Supreme Court of the United States in *Snyder v. Buck*, 340 U. S. 15, held in a parallel matter that an action abated for failure to substitute defendant within the prescribed period.

4. This Court, in the case of *Toshio Joji*, Civil No. 27557, granted on April 26, 1951, a motion to dismiss for failure to substitute the Attorney General of the United States as defendant in place of the Alien Property Custodian, pursuant to the provisions of Rule 25(d) Federal Rules of Civil Procedure.

5. The United States of America has not consented to be sued in such an action as is alleged in plaintiff's complaint.

Dated: January 23, 1953.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

NOTICE OF MOTION

To Plaintiff above named and Salvatore C. J. Fusco, 538 Front Street, San Francisco, California, his attorney:

Please Take Notice that the undersigned will bring the attached Motion for Rehearing on for hearing before the above-entitled Court, at Room

276, Post Office Building, 7th and Mission Streets, City and County of San Francisco, California, on the 26th day of January, 1953, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

[Endorsed[: Filed January 26, 1953.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR
RECONSIDERATION

The Court previously made its order granting plaintiff's motion to substitute party defendant. Thereafter defendant moved the Court to reconsider its ruling. The Court heard arguments and reviewed the authorities, including those submitted in the like case of Lew Shek Shan, et al., v. McGrath, No. 30127.

The Court now being fully advised, it is Ordered that defendant's motion for reconsideration be, and the same hereby is, Denied.

It Is Further Ordered that plaintiff's motion to substitute party defendant be, and the same hereby is, Confirmed.

Dated: February 24, 1953.

/s/ GEORGE B. HARRIS.

United States District Judge.

Fleming v. Goodwin,

165 F. 2nd 334;

Fleming v. People's Natural

Gas Co., 8 FRD 42;

FRCP 6(b).

[Endorsed]: Filed February 24, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the defendant above named and the United States Attorney, C. Tramutolo, and Edgar R. Bon-sall, Assistant United States Attorney, Post Office Building, San Francisco, California, and his attorney.

Please take notice that on Monday, March 23, 1953, at the hour of 9:30 a.m., or as soon thereafter as the matter can be heard in the Law and Motion Department, United States District Court, Post Office Building, Seventh and Mission Streets, San Francisco, the attorney for the Plaintiff will present a motion for substitution of party defendant.

The copy of this motion is attached herewith and made a part thereof.

/s/ SALVATORE C. J. FUSCO,

Attorney for Plaintiff.

[Title of District Court and Cause.]

MOTION FOR SUBSTITUTION OF
PARTY DEFENDANT

Comes now the Plaintiff in the above entitled action by and through counsel of record and moves this court for an order substituting Herbert Brownell, Jr., as Attorney General of the United States in the place and stead of the defendant, James P. McGranery, as Attorney General.

Said motion being filed pursuant to the provision of Rule 25 of the Federal Rule of Civil Procedure.

/s/ SALVATORE C. J. FUSCO,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed March 18, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF SALVATORE C. J. FUSCO IN
SUPPORT OF MOTION TO SUBSTITUTE
PARTY DEFENDANT

Salvatore C. J. Fusco, being first duly sworn, deposes and says:

1. He is the attorney for the plaintiff in the above entitled action and that James P. McGranery, defendant in the above entitled action, resigned from his office as Attorney General, and that Herbert Brownell, Jr., was duly appointed as Attorney General in the place and stead of the defendant, James P. McGranery, on or about January 21, 1953,

and that Herbert Brownell, Jr., has entered upon the duties of said office on or about January 21, 1953, and as such holds said office.

2. There is substantial need for continuing and maintaining said cause of action and obtaining adjudication of the question involved for the reason that the executing official of the Department of State has refused to recognize said plaintiff's claim of United States Nationality.

3. Your affiant is informed and on such information and belief states that Herbert Brownell, Jr., as Attorney General by and through his subordinate official will continue to deny the said plaintiff's claim of United States Nationality.

/s/ SALVATORE C. J. FUSCO,
Attorney for Plaintiff.

[Endorsed]: Filed March 18, 1953.

[Title of District Court and Cause.]

ORDER SUBSTITUTING PARTY
DEFENDANT

The motion for substitution of party defendant in this cause coming on to be heard before the court, and the court being fully advised in the premises, and it appears that the defendant, James P. McGranery, Attorney General of the United States, has been replaced by Herbert Brownell, Jr., as Attorney General, it is by this court the 30th day

of March, 1953, hereby ordered that Herbert Brownell, Jr., as Attorney General, be and he is hereby substituted as party defendant in this cause in the place and stead of James P. McGranery, as Attorney General.

/s/ EDWARD P. MURPHY,
Judge of the District Court.

[Endorsed]: Filed March 30, 1953.

[Title of District Court and Cause.]

SUPPLEMENTAL ANSWER

Comes now Herbert Brownell, Jr., Attorney General of the United States, by and through his attorney Lloyd H. Burke, United States Attorney for the Northern District of California, and Charles Elmer Collett, Assistant United States Attorney, and as a supplemental answer to plaintiff's complaint urges the following additional defense:

I.

That the answer previously filed be and is hereby adopted and made a part hereof.

II.

Plaintiff filed his complaint against J. Howard McGrath, Attorney General of the United States, on October 18, 1951. On December 11, 1952, plaintiff filed a motion to substitute James P. McGranery, who replaced former Attorney General

J. Howard McGrath on May 27, 1952. Plaintiff's motion to substitute was filed more than six months after James P. McGranery had replaced J. Howard McGrath as Attorney General of the United States and under Rule 25(d) of the Rules of Civil Procedure the action has abated.

Wherefore, defendant respectfully prays that the complaint and causes of action therein be dismissed.

LLOYD H. BURKE,

United States Attorney,

By /s/ CHARLES ELMER COLLETT,

Assistant United States
Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 5, 1953.

[Title of District Court and Cause.]

MINUTE ORDER—MAY 8, 1953

This cause came on regularly for further trial this date. Arguments of counsel were heard and both parties rested, and it was ordered that judgment be entered for the defendant and against the plaintiff, upon the preparation of findings of fact and conclusions of law, and a form of judgment, by counsel for said defendant.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on for trial on the 7th and 8th days of May, 1953, before the above-entitled court, Honorable Michael J. Roche presiding; Salvatore C. J. Fusco appearing as attorney for the plaintiff, and Lloyd H. Burke, United States Attorney for the Northern District of California, and Charles Elmer Collett, Assistant United States Attorney, appearing as attorneys for the defendant; and evidence having been received therein and the court having fully considered the same, now hereby makes the following Findings of Fact and, from said Findings of Fact, draws the following Conclusions of Law:

Findings of Fact

That the person who calls himself Wong Gong Fay and who claims to be the son of Wong Hie has failed to introduce evidence of sufficient clarity to satisfy or convince this court that Wong Hie is the natural blood father of the person, Wong Gong Fay, or that he was born at the time and place claimed, or that the person who appeared before this court claiming to be Wong Gong Fay is in truth and in fact Wong Gong Fay.

Conclusions of Law

The person appearing before this court as plaintiff in this action is not entitled to the relief prayed for in the petition.

Let Judgment be Entered Accordingly.

Dated: May 22, 1953.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed May 22, 1953.

In the United States District Court for the
Northern District of California, Southern
Division

Civil No. 30960

WONG GONG FAY,

Plaintiff,

vs.

HERBERT BROWNELL, JR., as Attorney Gen-
eral of the United States, Washington, D. C.,
Defendant.

JUDGMENT

The above-entitled action came on for trial on the 7th and 8th days of May, 1953, before the above-entitled court, Honorable Michael J. Roche presiding; Salvatore C. J. Fusco appearing as attorney for the plaintiff, and Lloyd H. Burke, United States Attorney for the Northern District of California, and Charles Elmer Collett, Assistant United States Attorney, appearing as attorneys for the defendant; the evidence having been received, the court having fully considered the same, and having

filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith;

Now, therefore, it is hereby Ordered, Adjudged and Decreed:

I.

That the relief sought by the plaintiff be and the same is denied.

So Ordered.

This 22nd day of May, 1953.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Lodged May 13, 1953.

[Endorsed]: Filed May 22, 1953.

Entered May 25, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given this 16th day of June, 1953, that plaintiff hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of this court entered on the 22nd day of May, 1953, in favor of defendant against said plaintiff.

/s/ SALVATORE C. J. FUSCO,
Attorney for Plaintiff.

[Endorsed]: Filed June 16, 1953.

[Title of District Court and Cause.]

COST BOND OF APPEAL

Whereas, The above-named Plaintiff has appealed to the United States Court of Appeals for the Ninth Circuit from the Judgment entered against him in said action, in the United States District Court, in and for the Northern District of California, Southern Division.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, Maryland Casualty Company, a corporation duly organized and existing under the laws of the State of Maryland, and duly authorized to transact a general surety business in the State of California, does undertake and promise on the part of the appellant, to secure the payment of costs if the appeal is dismissed, or the Judgment affirmed, or such costs as the Appellate Court may award if the Judgment is modified, not exceeding the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

It is expressly agreed by the Surety that in case of a breach of any condition hereof, the above-entitled Court, may upon notice to the Surety of not less than ten (10) days proceed summarily in the above-entitled action in which this bond is given, to ascertain the amount which the Surety is bound to pay on account of such breach and render judgment therefor against the Surety and award execution therefor, all as provided by and in accordance

with the intent and meaning of rule 34 of the Rule of Practice of the United States District Court in and for the Northern District of California.

In Witness Whereof, the corporate seal and name of the said Surety Company is hereto affixed and attested at San Francisco, California, by its duly authorized officer, this 10th day of June, 1953.

MARYLAND CASUALTY
COMPANY,

By /s/ W. G. KELSO,
Attorney-in-Fact.

The Premium on this bond is \$10.00 per annum.

State of California,
City and County of San Francisco—ss.

On this 10th day of June, 1953, before me, A. McClintock, a Notary Public in and for the City and County of San Francisco, personally appeared W. G. Kelso, known to me to be the Attorney-in-Fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal at my Office in

the City and County of San Francisco the day and year in this Certificate first above written.

[Seal] /s/ A. McCLINTOCK,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires January 12th, 1957.

[Endorsed]: Filed June 16, 1953.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

On motion of Salvatore C. J. Fusco, attorney for the above-named appellant, and good cause appearing therefor:

It Is Hereby Ordered that the time in which the above-named appellant may file the record and docket the appeal in the above-entitled matter is extended to and including the 31st day of August, 1953.

Dated this 23rd day of July, 1953.

/s/OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed July 23, 1953.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 30960

WONG GONG FAY,

Plaintiff,

vs.

HERBERT W. BROWNELL, JR., Attorney Gen-
eral of the United States, Washington, D. C.,
Defendant.

Before: Hon. Michael J. Roche, Judge.

REPORTER'S TRANSCRIPT PROCEEDINGS
ON TRIAL

Appearances:

For the Plaintiff:

SALVATORE C. J. FUSCO, ESQ.

For the Defendant:

LLOYD H. BURKE, ESQ.,

United States Attorney, by

CHARLES ELMER COLLETT, ESQ.,

Assistant United States Attorney.

Thursday, May 7, 1953—10:00 A.M.

Mr. Fusco: Your Honor, in this matter, the plaintiff, Wong Gong Fay, was held in detention, and on October 23, four or five days after the filing of this complaint, he was released on bond.

We are going to show that Wong Gong Fay is the son of an American citizen and as such is entitled to all rights and privileges of an American citizen.

We have three witnesses, in addition to the defendant, the father and friends and several documents.

The administrative procedures have been exhausted. The appeal denied his rights, and the administrative rights have been exhausted.

The Court: I will hear from the Government.

Mr. Collett: If the Court please, primarily, I think it will be necessary to call the Court's attention to the fact that we have filed, after a substitution was allowed, a supplemental answer, which is in the file, in behalf of the Attorney General Brownell, which raises a special defense that this action has abated. The plaintiff neglected to file a motion to substitute until after six months, after the appointment and the assumption of office by Attorney General McGranery following Attorney General McGrath, and the matter was presented to Judge Harris. He permitted the substitution. [2*]

We have raised the special defense that the action has abated, and the case of Snyder vs. Buck, of the Supreme Court, and Rule 25-D, and also the case of United States vs. Courussi in 168 Federal Reporter, 2nd Series, which we think holds conclusively that the action has abated.

Now it is a matter which has presented some difficulty to the courts to whom it has been pre-

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

sented. They perhaps have felt maybe there shouldn't be such a rule as 25-D——

Mr. Fusco: We propose an objection at this time.

Mr. Collett: There is nothing to object to. I don't think at this time.

The Court: No, he is only indicating now.

Mr. Fusco: Yes, your Honor.

Mr. Collett: Counsel was probably going to advise you that Judge Harris permitted the substitution. Permitting the substitution is different from a defense which is interposed, maybe by a special defense or by a motion to dismiss, which then again calls to the court's attention the ruling Judge Harris made permitting the substitution to go on and let the trial court determine whether or not it has abated.

I think unfortunately Rule 25-D is conclusive and——

The Court: I am not familiar with the rule. Will you read it?

Mr. Collett: This was a proceeding against the Commissioner of Immigration and Naturalization to set aside [3] the deportation order and it was abated and no application was made to substitute a successor, when the Commissioner resigned, or as a party respondent, until nearly nine months after the former Commissioner's resignation:

“Officers of the United States may be sued and suit against them may be maintained only pursuant to the rules of law laid down by Congress. The decision of the Supreme Court with respect to time

to making application to continue action against the successor to the Federal office who was a party to the action was binding upon the Circuit Court of Appeals.”

That is a Third Circuit case; the case of Snyder vs. Buck, also held to the same effect under substitution.

The Court: What is the date of that?

Mr. Collett: This is July the 8th, 1948.

The matter is procedural. There is a rule which I think your Honor is mindful of, the rather lengthy article that was written by Mr. Longsdorf, that appeared recently on substitution, and although, as far as the defense is concerned, there is no matter of endeavoring to avoid an action, we feel that where the action has abated, that counsel is pursuing a matter which is rather futile. Now I felt it necessary to call the Court's attention at the outset to the fact that he is confronted with this [4] problem.

The Court: Call your first witness.

Mr. Fusco: I shall call the father, your Honor. I request an interpreter.

The Court: Where is the interpreter.

(Chew F. Lew, an official Chinese interpreter, was thereupon sworn to truthfully and accurately and fully translate from the English language into the Chinese language, and from the Chinese language into the English language.)

Mr. Collett: If the Court please, with regard

(Testimony of Wong Hai.)

to the Interpreter, I understand that this man was allegedly born in the United States and has lived his entire life in the United States, except for possibly two years, and I would like this Court to be satisfied that he is not able to speak the English.

WONG HAI

called as a witness on behalf of Plaintiff, sworn through the Interpreter.

The Court: What is your name?

The Witness: Wong Hai.

The Court: Speak louder. Speak up. What is it?

The Witness: What name?

The Court: What is your name? [5]

A. Wong Hai.

Q. How do you spell it. Spell the name.

A. I don't know.

Q. How long have you been in the United States? A. Long time.

Q. What is it? How many years?

A. I lived here about——

Q. What? A. Long time.

Q. How many years? How many years have you been in the United States?

A. Oh, 50 years at least.

Q. What is it?

The Clerk: 50 years.

The Court: What is your business or occupation? What do you do?

(Testimony of Wong Hai.)

A. I have no business.

Q. What's that?

A. I no talk English. Not much.

The Court: Now you will have to speak loud enough so the Reporter will be able to hear you. He must take down everything you say. What is your full name?

A. Wong Hai.

Q. You speak up loudly so the Reporter can hear you. He has to hear you. What is it? What is your name? [6]

A. Wong Hai.

Q. And where do you live?

A. Jackson Street.

Q. What is the number? A. 980.

Q. What do you do? What is your business or occupation? A. Store. Work in a store.

Q. What store?

A. Store on Grant Avenue.

Q. What is the number there?

A. 911.

Q. What kind of a store is that?

A. Chinese grocery.

Q. What is it? A. Chinese grocery.

Q. How long have you been in that store, how long? A. 28.

Q. What do you do in that store, what kind of work do you do? Do you sell goods? A. Yes.

Q. Do you sell to people?

A. Grocery business. Chinese grocery, I sell.

Q. What is it? A. Grocery.

Q. Grocery? [7] A. Yes.

Q. Do you own that business?

(Testimony of Wong Hai.)

A. Importers.

Q. You own that business? A. Yes.

Q. Who else is in the store with you?

A. Who?

Q. Yes, who? A. Wing Hin Tin.

Q. Spell it. Spell it for the Reporter.

A. I know not how to talk.

Q. How can you run that store for 28 years and not be able to talk?

A. I talk Chinese.

Q. All Chinese customers? A. Yes.

Q. Do you know whether or not this witness can speak English at all?

Mr. Fusco: That's the extent of it, your Honor.

The Court: Is his enunciation impaired in any way?

Mr. Fusco: No, I just think he has lived and done business in Chinatown on Grant Avenue so long that he has never had occasion to learn or to make any progress in his English.

The Court: Do you feel that we ought to have an interpreter? [8]

Mr. Fusco: Yes, your Honor. I have tried to talk with him——

The Court: Is the official interpreter here?

Mr. Collett: Yes, sir, there is. If the Court please, you inquire a little further. Counsel says that he has been in Grant Avenue for a long time. I don't think that is so.

The Court: 28 years.

Mr. Collett: In Yreka or——

(Testimony of Wong Hai.)

Mr. Fusco: I simply made the statement, your Honor, that if he has been in a store on Grant Avenue, I say that they don't speak English too often. They make no progress in English.

The Court: I think in the interests of time we better use the Interpreter. Is this the official interpreter, here?

Mr. Collett: Yes, your Honor.

(Thereupon the witness, Wong Hai, was sworn again through the Interpreter.)

The Court: You may proceed, Counsel.

(The following proceedings were had through the Interpreter.)

Direct Examination

By Mr. Fusco:

Q. Where were you born?

A. In California.

Q. What city or town? A. Yreka. [9]

Q. On what date?

A. The first month, tenth day, Chinese reckoning.

The Court: What would that be? What date would that be?

The Interpreter: I wouldn't know without a book.

The Court: Where is your book?

The Interpreter: Without the——

The Court: Where is the book?

(Testimony of Wong Hai.)

The Interpreter: I think Mr. Levine has it.

Mr. Collett: He was born here in the United States and doesn't know the American date?

Mr. Fusco: What difference does that make?

(Handing conversion table to Interpreter.)

Mr. Collett: What was the Chinese C.R.

The Court: The Date?

Mr. Collett: Mr. Interpreter, what are you translating from to the American equivalent?

The Court: We are trying to determine the American date. He is translating it.

The Interpreter: February 26th, 1901.

Mr. Collett: But what is the Chinese?

The Interpreter: He gave the year as 1901.

Mr. Collett: I understand, but what is the C.R.?

The Interpreter: It is Cong Suey, 27th year.

The Court: In American, that would be [10] what?

The Interpreter: February 28th, 1901.

The Court: He was born in Yreka—ask him.

Mr. Collett: Eureka or Yreka? A. Yreka.

Mr. Fusco: What is your father's name?

A. My father was Wong Yen Ying.

Q. And your mother's name?

A. Chew Loi Gam.

Q. When was the first time you went to China?

A. 1904.

Q. That is the first time you went to China?

A. Yes.

Q. When did you go to China again?

A. I didn't.

(Testimony of Wong Hai.)

Q. You what? A. I didn't.

Q. You didn't. Did you have a passport and documents? A. Yes.

Q. Were you married——

Mr. Collett: If the Court please, something must be wrong here. If he was born in 1901, went to China in 1904——

Mr. Fusco: He has got the dates wrong.

Mr. Collett: Let Counsel get himself squared away.

Mr. Fusco: My Interpreter said that he answered 1924, not 1904. [11]

The Court: I think you said 1904.

The Interpreter: Yes. Then I was mistaken.

The Court: 1924 it was. Any of us are liable to make mistakes, even an interpreter.

Mr. Fusco: When were you married?

A. First month, tenth day.

Q. Can you give us that in English, Mr. Interpreter?

Mr. Collett: Of what?

The Interpreter: February 2, 1925.

Q. (By Mr. Fusco): Where were you married?

A. Toi Shan City.

Q. What is your wife's name? What is the equivalent of the name? A. Low Chin Gum.

Q. Do you know your father-in-law's name or what's the equivalent to a father-in-law?

A. Low Gum Gio.

Q. Do you know your mother-in-law's name,

(Testimony of Wong Hai.)

or what's the equivalent to a mother-in-law, her name? A. Ng Shee.

Q. Were you married by ceremony?

A. Yes.

Q. What type of ceremony?

A. Chinese custom.

Q. Explain that, what that is, the Chinese custom? [12]

A. Consisting of getting cookies and all sort of, oh, traditional ways for marriage.

Q. What is the traditional way of marriage?

A. Everything was written up and there was match-maker.

Q. Were there friends present, relatives, friends, presents? That is what I want to know?

A. No, just a few brothers and a few friends.

Q. How many children have you? .

A. Two.

Q. Boys or girls? A. Sons.

Q. No girls? A. No.

Q. How long after you were married was your first son born?

Mr. Collett: If the Court please, I object at this time to the question. No proper foundation laid to establish the capability of this man to know when the child was born, whether he was in China at the time, the opportunity he would have to know of the birth. There is no foundation laid for it. The objection is made at this time.

The Court: In what respect has it not been laid?

(Testimony of Wong Hai.)

Mr. Collett: The man was in China to know, to testify as to the birth of a child, that must be established first, that he has had some opportunity to know of the birth of the child. There has been no testimony here to establish that [13] he had.

The Court: This is the alleged father.

Mr. Fusco: This is the father.

Mr. Collett: Yes, but if the child was born when he wasn't in China, we don't know that he was in China at the time the child was born at the present moment.

The Court: When was the child born? Ask him.

Mr. Fusco: Your Honor—I beg your pardon. If the Court please, we haven't said that he has returned. Our testimony has placed him in China. Our testimony this far has not shown any return or having left China.

Mr. Collett: That may very well be, but he hasn't testified.

The Court: Let's find out where the child was born. Ask him where this boy was born?

A. In Toi Shan City.

Q. China? A. China.

The Court: Proceed, counsel.

Mr. Fusco: Were you present at the time of the baby's birth? A. Which one?

Q. The first one. A. Yes.

Q. How long after your marriage was this first child born? [14]

A. About a year or so after my marriage.

Q. What was the date of the birth?

(Testimony of Wong Hai.)

A. C.R. 15, 44——

The Interpreter: Which is May 15, 1926.

Q. (By Mr. Fusco): Was there any attending doctors or nurses?

A. Yes, there was an elderly woman who helped out.

Q. Where was the boy born, in a hospital or where? Just what was it, the——

A. At home.

Q. By the elderly lady, what do you mean by that? Is that a person that does things for the other women in the village?

A. Yes, we just called upon her for her services.

Q. Does she give that service to other people in the village?

A. I don't know about that.

Q. Was there any record or any birth certificate or anything written at the time the baby was born?

A. No, in China they don't have such things.

Q. Was there any ceremony or any celebration at the time of the baby's birth?

A. No, except there was a small celebration when the baby was about a month old.

Q. That is the custom in China?

A. Yes. [15]

Q. Then other people were present and knew the baby was born?

A. At the time when the baby was born, at such time, I was the only one home.

Q. Do you have any other children?

(Testimony of Wong Hai.)

A. I have another smaller one, who was born after I returned to the United States.

Q. When was this boy born, if you know?

A. 1927.

Q. Do you know the date and the month?

A. Fourth month, eighth day.

Q. That's about May 8th, is it, according to the reckoning?

A. C.R. 16, 4, 8.

The Interpreter: That is the equivalent to May 8th, 1927.

Q. (By Mr. Fusco): Were you present in China when your second baby was born?

A. No, I was not in China. I returned to the United States.

Q. When did you return to the United States?

A. In 1926.

Mr. Fusco: Ask him what the Chinese calendar is, if he knows.

A. Chinese Republic 16th year.

Mr. Fusco: Ask him if he knows the month?

Mr. Collett: If the Court please, I suggest to help the [16] record, if Counsel would avoid asking questions to the Interpreter. It gives a little difficulty for the Interpreter to direct the question to the witness, which is directed actually to the Interpreter. In other words, the form. To ask the witness a question which is directed to the Interpreter.

The Court: What is your question?

Mr. Fusco: I simply directed the question for the purpose, inasmuch as the Interpreter had the

(Testimony of Wong Hai.)

book in his hand, and it was better available to him—that is, the information was better available. I was asking what the month was. May I start again?

Mr. Collett: It wasn't an objection. I was simply making the suggestion to help the record. There has been a little difficulty on this before.

The Court: There is great difficulty in all of these cases.

Q. (By Mr. Fusco): What date did you return to the United States?

A. I arrived at San Francisco on the President Pierce on December 15, 1926.

Q. Did you return to China after that date?

A. No.

Q. Have you made payments in support of your family? A. Yes. [17]

Q. What amounts and how often did you make these payments? Just tell us what you did, to the best of your recollection, throughout the period of time after you returned to the United States?

A. Before the war I used to send about one thousand Hong Kong money each year to my family, divided into three remittances.

Q. To whom did you send that money?

A. I sent this money to my son in Toi Shan City, who gave the money to my wife, for the family expenses.

Q. Now just going back a bit, when you returned to the United States in 1926, did you make

(Testimony of Wong Hai.)

a landing statement, did you make any statement to the authorities when you landed?

A. How do you mean by that? Oh, yes.

Q. Did you say, "Oh, yes."

The Interpreter: Yes.

Mr. Fusco: Were you asked to sign anything, did you make a statement to somebody that wrote these answers down?

Mr. Collett: We will object, if the Court please. There is no foundation laid as to time, place, persons to whom it was made, how it was made.

The Court: What was your question, Counsel?

Mr. Fusco: "Did you make a landing statement?"

The Court: When?

Mr. Fusco: "On the day that you arrived." [18]

The Court: What date was that?

Mr. Fusco: 1926.

The Court (To the Interpreter): Ask him if he made any statement.

A. Yes, I think I signed a paper, like that, aboard ship.

Mr. Fusco: I think that document is in the possession of the defendant. May that be introduced?

The Court: The document is available?

Mr. Collett: Yes, sir. He can offer the whole thing in evidence. Put the whole thing in evidence.

Mr. Fusco: No. No.

Mr. Collett: I want to introduce this landing statement. I want to introduce this landing statement and I want to ask——

(Testimony of Wong Hai.)

The Court: You want him to recognize some writing?

Mr. Fusco: Yes, your Honor.

The Court: Why don't you ask him?

Mr. Fusco: I will.

The Court: Speak out loud so the Reporter is able to hear you.

Mr. Fusco: I was just confused for a moment.

Mr. Collett: For counsel's benefit, he must refrain from asking the Interpreter to ask the witness a question. It should be directed to the Interpreter and for the Interpreter to interpret.

Mr. Fusco: Mr. Wong, will you look at this. Do you [19] recognize this document?

A. This was the paper I signed aboard ship.

The Court: Where did he sign it? Where did he sign this paper?

Mr. Collett: If the Court please, we might be of a little more assistance here, in order to know what we are talking about, and perhaps the Clerk might mark this for identification so we will have some basis of knowing what we are talking about.

The Court: Wait until he recognizes this. Ask him if the signature is there on that document?

A. Yes, my name is on that paper.

The Court: Very well. Let it be admitted for purposes of identification.

The Clerk: Plaintiff's Exhibit 1 marked for identification.

(Landing Statement of Wong Hai marked Plaintiff's Exhibit No. 1 for Identification.)

(Testimony of Wong Hai.)

Q. (By Mr. Fusco): On that statement did you say that you had any children?

Mr. Collett: Well, if the Court please, the statement speaks for itself.

Mr. Fusco: That is all.

The Court: What does the document indicate?

Mr. Fusco: It indicates that he does, your Honor.

The Court: Well, ask him about it. Ask him what you [20] have in mind.

Q. (By Mr. Fusco): Did you state that you had a son, and did you give the name of your son in that statement? A. Yes, I did.

Q. What name did you give?

A. Wong Gong Fay.

Q. Now I have here some documents. Do you recognize these documents?

The Court: Show them to him, counsel. Show them to counsel.

Mr. Fusco: The last time I did, he didn't want to see them.

Mr. Collett: Counsel, please——

The Court: We will take a recess so that counsel can familiarize themselves with these documents, whatever they may be.

(Recess taken.)

Mr. Collett: At this time I would like to ask counsel if he has any witnesses in the courtroom, other than the plaintiff, whom he expects to call.

The Court: You may ask him.

(Testimony of Wong Hai.)

Mr. Fusco: Yes, I do.

The Court: They will have to retire until they are called.

Is that what you have in mind? [21]

Mr. Collett: Yes, if the Court please.

Mr. Fusco: Has counsel examined the papers?

Mr. Collett: Yes.

Are you going to show them? Counsel, it might be helpful if you have the Clerk mark them for identification.

Mr. Fusco: May I have these marked for identification?

The Court: So marked.

Mr. Fusco: As a group.

Mr. Collett: Are you going to group them together? I suggest that your group them together.

Mr. Fusco: I think we will wait until they are described.

Mr. Collett: If the Court please, the only reason for my suggestion, it is helpful to know what is being described.

Mr. Fusco: These are school reports of the plaintiff.

The Court: Of whom?

Mr. Fusco: The plaintiff. The report cards of the plaintiff.

The Court: What does this witness know about them?

Mr. Fusco: Well, they were sent to the father, and I shall ask him if he recognizes them.

The Court: Very well, proceed.

(Testimony of Wong Hai.)

The Clerk: Plaintiff's Exhibits 2, 3, 4, 5 and 6, marked for Identification.

(Thereupon Chinese documents with English translations purporting to be report cards, marked for identification Plaintiff's Exhibits 2, 3, 4, 5 and 6.)

Q. (By Mr. Fusco): Mr. Wong Hai, I show these documents and ask you if you recognize them, and tell us what they are, if you know?

Mr. Collett: If the Court please, I don't understand the question. You say you offer him the documents?

Mr. Fusco: To tell us what they are.

The Court: He is trying to identify them.

Mr. Collett: Yes, I understand. I am trying to help him to identify them.

The Court: Ask him to examine them and state what they are if he knows.

A. This paper was issued by the section head to—that verifies the family.

The Court: Identify the document.

Mr. Collett: If the Court please, the witness has testified he was not in China at this time and there is no foundation laid as to what basis——

Mr. Fusco: I intend first to ask him, first to ask him to recognize them, and then I shall ask him if they came into his possession, or I can do it inversely. Maybe I could save time for the Court.

Q. (By Mr. Fusco): Did you receive any school

(Testimony of Wong Hai.)

reports from your son in China or from the school authority where your son [23] was attending?

A. Yes, these are the ones.

Q. Where your son was attending?

A. Yes, these are the ones. Like this. The report card here was sent to me from China.

The Court: Name the exhibit.

A. Exhibit 5.

Q. (By Mr. Fusco): How about the next one.

A. Exhibit 3, Exhibit 6—Exhibit 6 was issued in C.R. 34.

Mr. Fusco: I didn't ask him the question yet. Just one moment. Tell him not to answer any questions until I ask them.

A. Exhibit 4.

Q. (By Mr. Fusco): When did you receive them?

A. These were sent to me individually year after year while the boy was attending school.

Q. What boy? A. Wong Gong Fay.

Q. Did you make your income tax reports?

A. Yes.

Q. When did you make your first income tax report and what years did you file your income tax reports?

A. About the beginning of the war. It's been about ten years ago already. [24]

Q. Did you claim any exemptions?

A. Yes, I claimed two sons and one wife as my dependents.

(Testimony of Wong Hai.)

Q. Do you have those reports in which you claimed the sons?

A. I submitted them to the Immigration Service.

Mr. Fusco: May I ask the Court if the defendant will produce them, if they are available.

The Court: Are they available, counsel?

Mr. Collett: Yes. (Handing counsel.)

Mr. Fusco: I ask this be marked as plaintiff's exhibit, as a group, your Honor?

The Court: No objection?

Mr. Collett: You are offering those in evidence?

Mr. Fusco: As an exhibit.

The Court: Admitted and marked.

The Clerk: Plaintiff's Exhibit No. 7 marked for identification.

(Thereupon copies of income tax returns for 1942 and 1943, Wong Hai, marked Plaintiff's Exhibit 7 for Identification.)

The Court: For what years, counsel?

Mr. Fusco: This is for the year 1942, your Honor.

The Court: Is that the only one you have?

Mr. Fusco: Counsel, are there any more?

Mr. Collett: That's all we have. [25]

The Court: Admitted and marked next for identification.

Mr. Fusco: I ask you to look at this document and tell us what it is, if you know?

A. This is the income tax report.

Q. Was that signed by you? A. Yes.

(Testimony of Wong Hai.)

Q. What sons did you name?

A. Wong Gong Fay and Wong Kai Gong, and also Low Shee.

Mr. Collett: On this exhibit, if the Court please, I believe this is a copy of a return, and this is not the original. You have that in mind?

Mr. Fusco: Yes.

Mr. Collett: I mean it is his document which was presented.

Mr. Fusco: Then as a copy, I simply ask him if he recognized it, and he said he recognized it. That's all, your Honor.

That is all, your Honor.

The Court: Any questions, Counsel.

Mr. Collett: Well, if the Court please, at this time I would like to ask that the cross-examination of this witness be deferred until the entire case has been presented. I have requested in the last several cases that have been tried such procedure in order to see what proof there is.

The Court: We will proceed here in this case like we do [26] in every case.

Cross-examination.

Cross-Examination

By Mr. Collett:

Q. Do you have a birth certificate?

A. No. I was born in the country and they didn't have it in such times.

Q. You say they didn't have birth certificates

(Testimony of Wong Hai.)

in the State of California at the time you were born?

Mr. Fusco: Objection, your Honor.

A. I don't know about that. My mother didn't tell me about it.

Mr. Collett: What part of the country—you were born in Yreka, the city?

A. Yes. There was a Chinatown in that city.

Q. To your knowledge you have never seen a birth certificate regarding your birth?

A. No, I hadn't seen one. My mother didn't give me one.

Q. Did you go to school?

A. Yes, I have been to school for two years.

Q. Where did you go to school?

A. In the town of Yreka.

Q. And what year?

A. 1914 and 1915, I attended two years of schooling.

Q. You remember the name of the school?

A. No, I cannot remember now. [27]

Q. Do you recall whether or not there was any birth record given to the school at the time you attended school?

A. My mother took care of those matters. I didn't know.

Q. Where is your mother now?

A. She is in New York. I haven't heard from her for a long time.

Q. Do you have her address? A. No.

Q. When is the last time you heard from your mother?

(Testimony of Wong Hai.)

A. Ever since I returned from China, I have not received any letter from her.

Q. Where is your father?

A. He died a long time ago.

Q. What year? A. 1914.

Q. Where? A. In the town of Yreka.

Q. When did your mother go to New York?

A. After we brothers returned to China, she went to New York.

The Court: What year was that?

A. 1924. That was the year we went to China.

Mr. Collett: How long prior to your departure did she go to New York?

A. Right after we left for China. [28]

Q. How many brothers did you have?

A. I have four younger brothers and one sister.

Q. Were they all younger than yourself?

A. Yes, except my sister, who is older.

Q. Your sister is the oldest of the family?

A. Yes.

Q. Do you know when she was born?

A. 1899 she was born.

Q. 1899? A. Also in Yreka.

Q. Do you know whether or not there was a birth certificate of her birth?

A. I don't know about that.

Q. Who is the next oldest brother—when was he born? A. 1902.

Q. Do you know of any birth certificate as to his birth?

(Testimony of Wong Hai.)

A. I don't know of any birth certificates as to the birth of any of your brothers?

A. I don't know.

Q. Do you have a death certificate as to your father?

A. I only know when he died and I knew that his remains were sent to China.

Q. When? A. You mean when he died?

Q. No, when were the remains sent to [29] China?

A. My brothers took care of the matter. I don't know. It was shortly after his death, that he was shipped to China.

Q. Weren't you the oldest brother?

A. Yes.

Q. Wasn't that your responsibility to take care of that matter?

Mr. Fusco: May I interpose an objection at this time? I can't understand what relevancy—what counsel is trying to show. First I think that this is without the scope of the direct examination. And what bearing would that have, whether he knew—whether the plaintiff knew of the time—the birth certificate, the time of death, the birth certificates of the brothers at their tender ages? What bearing would that have, the relationship?

The Court: It goes to the credibility of the witness. I will allow it. Proceed.

Mr. Collett: Withdraw the question. Wasn't it your responsibility as the oldest brother to make

(Testimony of Wong Hai.)

arrangements for the shipping of the remains of your father?

A. I was only 10 years old and I didn't know how. My mother took care of the situation.

Q. Well, you just told us your younger brothers took care of it?

A. No, I didn't say it was my younger brothers who took care of it. [30]

Q. You didn't say that your younger brothers took care of it, is that right?

A. No, I didn't say that.

Q. You say it was your mother who took care of it? A. No, a distant relative or cousin.

Q. Well, who took care of the shipping of the remains of your father back to China?

A. Wong On.

Q. Who is Wong On? A. Cousin.

Q. Where is Wong On now?

A. I don't know where he is now. He used to be in the country.

Q. What do you mean by "in the country"?

A. Yreka.

Q. When did you last see Wong On?

A. I have not seen him for a long time. I have not seen him ever since I went to China.

Q. Prior to the time you left China, when was the last time you recall seeing him?

A. I can't quite remember now. I remember I had seen him in quite a few occasions before I went to China.

Q. When did you leave—that is, when did he

(Testimony of Wong Hai.)

leave Yreka? A. I don't know when he left.

Q. Where are your younger brothers now? [31]

A. Some in Seattle, some in Texas.

Q. Who is the one in Seattle?

A. The second one, named Wong Fun.

Q. The name is Wong Fun?

A. Wong Fun.

Q. How do you spell that?

The Interpreter: The closest I can get to it
F-o-n.

Q. (By Mr. Collett): What is his address?

A. He doesn't correspond with me. I only know
he is there.

Q. How do you know he is there?

A. His friends told me, and his friends told me
he is now blind.

Q. Which friend?

A. I don't know; some Wongs and some Lees.

Q. What was the name of the friend that told
you he was blind?

A. A person of the Lok family told me about
that. He came out from the country.

Q. A person of which family? A. Lok.

Q. How do you spell that?

The Interpreter: L-o-k.

Mr. Collett: Didn't you just tell us somebody
in the Wong or the Lee family?

A. I mean Lee Lok. [32]

Mr. Collett: Mr. Interpreter, how would you
spell that?

The Interpreter: L-e-e L-o-k.

(Testimony of Wong Hai.)

Q. (By Mr. Collett): Is that a person, Lee Lok?
A. Yes.

Q. Where is Lee Lok?

A. He is over there in that town. I haven't seen him for a long time. He only comes out once every two or three years.

Q. In what town? A. In Seattle.

Q. When is the last time he came out?

A. I can't quite remember what year it was. It must have been about two to three years ago.

Q. Where is your other brother?

A. Some in Texas.

Q. In Texas. What is his address?

A. I do not have their addresses. When we came back from China they told me they were going to Texas. That's all.

Q. You have not heard from him since you came back from China?
A. I have not.

Q. How do you know he's in Texas?

A. I don't know. They told me before they were going to Texas.

Q. What is the name of the brother that you say is in Texas? [33]
A. Wong Hem.

Q. Where is your sister?

A. In New York.

Q. What is her address?

A. I don't have her address. I have not heard from her.

Q. When is the last time you heard from her?

A. Ever since I returned from China I have not heard from her.

(Testimony of Wong Hai.)

Q. How do you know she is in New York?

A. She was in New York. That is how I know

Q. Is that before you went back to China?

A. Yes.

Q. Wong Hem is the third oldest brother, is that correct?

A. No, Wong Hem is the oldest brother.

Q. What is the name of the next youngest?

A. Wong Suey.

Q. Where is Wong Suey?

A. I don't know where he is now. Last year he was in Oakland.

Q. What was his address in Oakland last year?

A. I don't know. He didn't tell me what the address was he was residing at, but he told me it was near Chinatown.

Q. When did you see him last?

A. Sometime last year, I cannot remember the exact month now. [34]

Q. Where?

A. He came to the store and saw me.

Q. When is the next time prior to that that you saw him?

A. I didn't see him. He only came to see me.

Q. You didn't see him then when he came to see you, do I understand that correctly?

A. Maybe I was not in the store. If that was the case, he couldn't possibly see me. He can only see me when I was in the store.

Q. When did you leave Yreka? A. 1924.

Q. We have had your youngest, next oldest.

(Testimony of Wong Hai.)

What is the name of the third oldest brother?

A. Wong Ng.

Q. How do you spell that?

The Interpreter: N-g.

Q. (By Mr. Collett): What was the date of his birth? A. 1903.

Q. Where is he?

A. I haven't seen him for quite a few years. I don't know where he is now.

Q. When did you see him last?

A. About four to five years ago.

Mr. Collett: Is that four or five, Mr. Interpreter?

The Interpreter: Yes. [35]

Q. By Mr. Collett: Do you remember the year?

A. I cannot remember.

Q. Where?

A. I think he came to the store to see me.

Q. Where was he living then?

A. He went back and forth. He was residing in a hotel.

Q. Where?

A. I don't know. He didn't tell me.

Q. You state you went to China in 1924?

A. Yes.

Q. Do you recall the month?

A. Yes, that was the 12th month, December, that was.

Q. Who went with you?

A. All my brothers.

Q. All your borthers went with you at the same

(Testimony of Wong Hai.)

time and on the same boat? A. Yes.

Q. What was the employment of your father during the time that he was alive, if you know?

A. He was a gold miner.

Q. After his death, who supported your family?

A. My mother.

Q. Was she employed?

A. No, she didn't work.

Q. How did your father die? [36]

A. He died from some sort of illness.

Q. How do you know—do you know how your mother received money to support her family after your father's death?

A. My father probably left her some money.

Q. You say probably, do you know for certain whether or not there was any money?

A. No, I do not know.

Q. Do you know whether or not there was any estate that went into Court up in Yreka or any town nearby?

Do you understand that question?

Ask him. You translate it and see if he understands it. A. No.

Mr. Collett: Does he understand what I mean?

A. You probably mean whether my mother was able to claim some support from the Government?

Q. No. I don't mean that.

The Court: That wasn't the fashion in those days, was it?

Mr. Collett: No.

The Court: All right, let's proceed.

(Testimony of Wong Hai.)

Q. (By Mr. Collett): Do you know whether or not your mother had to go to Court with regard to any money that your father may have left?

A. No, I didn't see such actions.

Q. Did you work during the time you were at Yreka? [37]

A. Yes, I worked in the restaurant.

Q. When did you first go to work?

A. I must have been about 20 years old. I do not remember exactly, but since my father died I knew that I had to work.

The Court: How old was he when his father died?

A. 12 or 13 years old.

Mr. Collett: Your father died, you say, in 1914. You were born in 1901. You say you went to work when you were 20 years old?

A. About 20 years old.

Q. Do you recall for whom you worked?

A. I worked for the Royal restaurant.

Q. For whom? I didn't understand.

A. Royal. The restaurant, the Chinese call Loy Lou, which was owned by Wong On.

Mr. Collett: How is that spelled.

The Interpreter: L-o-w L-o-o.

Mr. Collett: Was that the name of the restaurant, the Low Loo Restaurant? A. Yes.

Q. Where was it located? A. In Yreka.

Q. The name of the operator of the restaurant was Wong On? A. Wong On.

The Court: We will take the adjournment until two.

(Thereupon a recess was taken until 2:00 o'clock p.m.) [38]

Thursday, May 7, 1953—2:00 P.M.

WONG HAI

called as a witness on behalf of the plaintiff, resumed the stand and testified further as follows:

Cross-Examination
(Resumed)

By Mr. Collett:

Q. When did you come to San Francisco from your trip to China in 1924?

A. The end of the year. I was in San Francisco for a short time before I went to China.

Q. How long a time were you in San Francisco before you left for China?

A. About a month or so.

Q. Prior to the time of his death, was your father engaged in mining up to immediately before the time that he died?

A. No, he was too old to mine then. He was 70 odd years old.

Q. 70 years old at the time he died? When did he stop mining?

A. I was too small to remember that.

Q. Then you only knew about his mining because somebody told you, is that right?

A. My mother told me.

Q. What was your father's ancestral village?

(Testimony of Wong Hai.)

A. Nom Hon Section of Toi Shan district. [39]

Q. Nom Hon Section. How do you distinguish that from a village, a section from a village, what is the difference?

A. A village is like a section, and a section is somewhat like a village.

Q. Is the section the same thing as a village?

A. Yes. In our part of the country we call a section. A section is a village.

Q. You left San Francisco about December 28th, 1924, on your way to China, is that right?

A. Yes.

Q. And you say your four brothers were with you? A. Yes.

Q. Where did you arrive in China?

A. I went to Toi Shan City.

Q. No. Where did the ship land in China? Where did you get off the ship in China?

A. In Hong Kong.

Q. Did it stop anywhere between San Francisco and Hong Kong? A. Only at Japan.

Q. It stopped at Japan. What vessel was it?

A. The Lincoln.

Q. How long did it take to get to Hong Kong?

A. It took 28 days to a month in those old days.

Q. After you arrived in Hong Kong, where did you go?

A. I went to Toi Shan District. [40]

Q. Well, did you stay in Hong Kong at all?

A. Yes, only for a few days.

(Testimony of Wong Hai.)

Q. Where is Toi Shan District from Hong Kong?

A. It takes about a day or so to travel from Hong Kong to Toi Shan District.

Q. And how long did it take you to get there?

A. In the old days I took a boat to Gong Won, and then from there by train.

Q. You say you took a ship to where?

A. Bot Goi.

Q. Bot Goi was that? A. Yes.

Q. Did you go to Canton? A. No.

Q. Could you tell us where Bot Goi is from Hong Kong?

A. It took about an overnight traveling by ship for ten hours.

Q. And from Bot Goi you say you took a train?

A. Yes.

Q. And where did you get off the train?

A. At Toi Shan City.

Q. Why did you go to Toi Shan City?

A. That's where the train stopped before I can go to my village.

Q. Then you got off the train at Toi Shan City and from there [41] you went to the village. Which direction is the village from Toi Shan City?

A. About eight lis from Toi Shan City.

Mr. Collett: And, Mr. Interpreter, a Lis is what?

The Interpreter: A third of a mile.

Mr. Collett: Do you recall which direction the village is eight lis from Toi Shan City?

A. East of Toi Shan City.

(Testimony of Wong Hai.)

Q. Who was there in the village? You say that is Nom Hung?

Mr. Interpreter, how do you spell that?

The Interpreter: N-o-m H-u-n-g.

Q. (By Mr. Collett): Who was there in Nom Hung village that you knew?

A. I can't remember now. I heard that there were some relatives there, but not too closely related.

Q. When did you hear that?

A. My mother told me and she told me to go down there for a visit.

Q. Well, where did your brothers go?

A. They also went there.

Q. You were all together at the same place?

A. Yes.

Q. And do you recall where you went, the name of the people to whom you went first when you first arrived at the village?

A. It's been such a long time I cannot remember the particular [42] name, especially when I was only there for a short visit.

Q. Then where did you go?

A. Then I returned to Toi Shan City.

Q. Where did you go in Toi Shan City?

A. I rented a house on Main Street.

Q. Why did you go to Toi Shan City?

A. Because I was residing there.

Q. Well, you just arrived. You hadn't been residing there. Why did you go to Toi Shan City to reside?

(Testimony of Wong Hai.)

A. That is the place where I was going and I lived there.

Q. Why is that the place that you were going?

A. My mother told me to go to Toi Shan City and get married. That's why I lived there.

Q. Your brothers were still with you?

A. Were with me where? You mean living in Toi Shan City?

Q. Yes. Were your brothers with you in Toi Shan City? A. Yes.

Q. Did they live with you all the time you were in Toi Shan City?

A. Yes, we were living together.

Q. The entire time you were in China?

A. No. Some moved away because they liked other places.

Q. You say some moved away. Well, now, we will take Wong Hem. When did he move away?

A. I cannot remember now. [43]

Q. Why did they like other places?

A. He didn't like to live together. Therefore, he wanted to move away.

Q. Where did he go?

A. Somewhere in Toi Shan City.

Q. Wong Suey, when did he leave?

A. I cannot remember now. They got married and moved away.

Q. You say he got married, Wong Suey got married? A. Yes.

Q. When? A. You mean Wong Suey?

Q. That is what I said.

(Testimony of Wong Hai.)

A. About the third month—I'm not so sure.

Q. He moved away, too, did he? A. Yes.

Q. Wong Ng, the third brother, when did he move away?

A. Wong Ng—I cannot remember that.

Q. Did he move away?

A. He also moved away after they were married.

Q. Where did he go?

A. He was also in Toi Shan City.

Q. Do you remember where?

A. Some lived in Tfi On See—the west part of Toi Shan City. I really cannot remember what address.

Q. Did Wong Ng get married? [44]

A. Yes.

Q. Did Wong Fun move away?

A. Yes, he was married and move away.

Q. Where did he go?

A. Also in Toi Shan City.

Q. You returned to the United States from China December the 18th, 1926, is that correct?

A. Yes.

Q. Did you come back by yourself?

A. Yes.

Q. You say you were married on February 2, 1925, is that the date? A. Yes, 1925.

Q. Who arranged for the marriage?

A. Nobody actually did. The neighbors suggested that I should get married and helped me.

Q. Well, you stated that you left the United States on December the 28th, 1924, and it took you,

(Testimony of Wong Hai.)

so you stated, something like 28 days to get to Hong Kong. When did you arrive in Toi Shan City?

A. I arrived there on the 12th month, the Chinese reckoning—that was during the Chinese New Year season.

Q. What year and month?

A. The last part of December, 1924, or January, 1925.

Q. Well, as I understand it, you left the United States on [45] December the 28th, 1924, that is correct, is it not? A. Yes.

Q. How long after you arrived in Toi Shan City did you get married?

A. About two to three weeks.

Q. Are you sure of that? A. Yes.

Q. Are you sure that February the 2nd, 1925, is the date of your marriage?

A. February 2?

Q. Yes? A. Yes.

Q. You didn't arrive in Toi Shan City until the 8th of February, 1925, isn't that so?

A. No. It was in the 12th month, Chinese reckoning. I remember I was there for a short time before Chinese New Year.

Q. What was Chinese New Year in 1925?

A. When I left San Francisco it was only 11th month of Chinese reckoning.

Mr. Collett: Did you get that, Mr. Interpreter, when was the Chinese New Years in 1925?

The Interpreter: January the 24th, 1925.

Mr. Collett: What was it?

(Testimony of Wong Hai.)

The Interpreter: January 24th, 1925.

Mr. Collett: Excuse me. Excuse me. The last day of [46] C.R. 13, which is 1924, equivalent to Western reckoning is January 23, 1924—No, '25. January, 1925.

Mr. Collett: Mark this for identification.

The Clerk: Defendant's Exhibit A marked for identification.

(Document headed U. S. Dept. of Labor, Immigration Service, May 9, 1924, marked Government's Exhibit A for identification.)

Q. (By Mr. Collett): I will show you Exhibit A——

Mr. Fusco: Counsel——

Mr. Collett: There is no question, is there, Counsel? He departed on——

Mr. Fusco: I just wanted to see that.

Mr. Collett: Will you stipulate he departed on December 27, 1924?

Mr. Fusco: I won't stipulate to anything. I want to see that.

Mr. Collett: Very well.

Q. (By Mr. Collett): I will show you Government Exhibit A. That's your photograph, is it not?

A. Yes.

Q. And you recall that document?

A. No, I don't remember what it was for. Could it be the document that I used on the ship?

Q. Yes, it is—this is your signature, is it not, appearing on the document? [47]

(Testimony of Wong Hai.)

A. Yes, and also the photograph.

Q. That shows that you departed San Francisco in accordance with your intention to leave the United States on December the 27th, 1924.

Does that help your recollection? A. Yes.

Mr. Collett: I ask that it be admitted into evidence.

The Court: Admitted and marked.

The Clerk: Government's Exhibit A heretofore marked for identification admitted and filed in evidence.

(Thereupon document previously marked A for identification received and marked in evidence as Government's Exhibit A.)

Q. (By Mr. Collett): If you left the United States on December 27th, 1924, and your testimony is that it took 28 some odd days to get to Hong Kong and two or three weeks after you arrived in Toi Shan Village before you were married, what was the correct date of your marriage?

Mr. Fusco: I ask the Interpreter to translate the substance of that conversation. Translate the conversation.

The Court: What was it he said?

The Interpreter: Oh, he said: "I left the United States on the 11th month of Chinese reckoning and I was married on the 7th, first month, 10th day, Chinese reckoning, C.R. 14.

Mr. Collett: What is that in terms of our calendar?

(Testimony of Wong Hai.)

The Interpreter: Our calendar—the date of departure [48] from San Francisco should be recorded as December 24, 1924. The date of his marriage should be February 2, 1925.

Mr. Collett: How long did you say he stayed in Nom Hung Village after you arrived there?

A. Not very long. Just one day.

Q. Do you understand that in accordance with the Government Exhibit A that your ship departed from the United States on December 27, 1924?

A. Yes.

Mr. Collett: Would you translate that into the Chinese equivalent, the date.

The Interpreter: December 27th. You want it in English?

Mr. Collett: I want you to translate that American date into C.R. date, so I am sure that he knows what I am talking about in terms of Chinese.

A. It couldn't be on the 12th month. It must be on the 11th month.

Mr. Collett: Why must it be on the 11th month?

A. I don't know. I can only remember the American reckoning which was on December 27th.

Q. December 27th. Now you are quite sure your recollection is that it took at least 28 days to get to Hong Kong?

A. Yes.

Mr. Collett: Will you translate the Chinese for me, the C.R. date, representing the date January the 26, 1925? [49]

The Interpreter: C.R. 14, first month, 3—

Mr. Collett: C.R. 14, 1, 3?

(Testimony of Wong Hai.)

The Interpreter: Yes, sir.

Q. (By Mr. Collett): Do you recall your arrival in Hong Kong as being about C.R. 14, 1, 3?

A. You mean Western reckoning?

Mr. Collett: Mr. Interpreter, I have endeavored to accomplish from you the Chinese reckoning for the date January the 26, 1925. I don't know it myself. If you will just simply translate that into the Chinese reckoning.

The Interpreter: January 26, 1925.

A. Is the first date of the C.R. 14—

Mr. Collett: That is one, C.R. one, three, one, four, is that correct?

The Interpreter: C.R. 14, 1, 3.

Mr. Collett: C.R. 14, 1, 3—now is it your recollection that you arrived in Hong Kong on about C.R. 14, 1, 3?

A. I can't quite remember now.

Q. How many days after you arrived in Hong Kong did you reach Toi Shan Village?

A. Just one day.

Q. Well, you stopped one day and then—that is, at Nom Hung Village, and how many days was it before you took up residence in Toi Shan [50] City?

A. After I arrived at Toi Shan City and went to Nom Hung Village for one day, I went back to Toi Shan City and lived there.

Q. Did you work while you were in Toi Shan City?

A. No.

Q. Where did you get the money to support yourself in Toi Shan City?

(Testimony of Wong Hai.)

A. I had some money with me.

Q. Where did you get that money?

A. I saved it up from working.

Q. Did you work at any time while you were in China? A. No.

Q. What is the date of your birth?

A. 1901.

Q. What month and what year?

A. First month, tenth day, Chinese Reckoning.

Q. What would be the full equivalent in Chinese Reckoning for that year, month and date?

The Interpreter: February 28, 1901.

Mr. Collett: And that is C.R. or K.S.?

The Interpreter: K.S. 27.

Mr. Collett: K.S. 27. What is the rest of it?

The Interpreter: K.S. 27, 1, 10.

Mr. Collett: What is the equivalent of Chinese Reckoning of February 2, 1925? [51]

The Interpreter: February 22, 1925?

Mr. Collett: Yes.

The Interpreter: C.R. 14, 1, 30.

Mr. Collett: February 2, 1925, you say February 2 is——

The Interpreter: C.R. 14, 1, 30.

Mr. Collett: What is the Chinese Reckoning of your marriage date?

A. First month, tenth day.

Q. That is C.R. then. What year? C.R. 14, 1, 10, is that correct? A. Yes.

Q. C.R. 14, 1, 10, what is the equivalent of that in the American calendar?

(Testimony of Wong Hai.)

The Interpreter: February 2, 1925.

Mr. Collett: You were in error then, Mr. Interpreter, when you said it was 1, 30?

The Interpreter: You asked for February 22, 1925.

Mr. Collett: No; I tried to make it clear, February 2. I said second, February 2nd, 1925.

The Interpreter: 14, 1, 10, and his birthdate is 27, 1, 10.

Mr. Collett: Is there any relationship between the 27, 1, 10, and 14, 1, 10—is that a matter of assistance to your memory?

The Interpreter: Repeat that. [52]

Mr. Collett: Is there any relationship between the two dates, 27, 1, 10 and 14, 1, 10, is that of assistance to your memory?

The Court: I can't quite understand that question myself.

Mr. Collett: Well, 1, 10——

The Court: This is your witness. Ask him directly. Cut down your question so that there is no question about it.

Mr. Collett: Well, withdraw the question.

Q. (By Mr. Collett): You testified that this marriage was on a written agreement, is that correct?

A. I did not say the marriage was recorded or in words. What I meant was that a three generation paper was signed.

Q. Do you have that paper?

A. No, I did not bring one from China.

(Testimony of Wong Hai.)

Q. Where is it? A. What, the paper?

Q. The paper I just asked you about, that you testified to.

A. I left it in China. I did not bring it with me.

Q. Where is it?

A. I cannot remember now. It's been such a long time.

Q. You say the marriage was arranged by the neighbors? A. Yes.

Q. Who were the neighbors?

A. I cannot remember the name now. [53]

Q. You stated the marriage was by ceremony, was that correct? A. Yes.

Q. Where was the ceremony performed?

A. At a house where we lived in Toi Shan City.

Q. Were your brothers present?

A. Yes, they were there.

Q. In 1942 you filed an individual tax return, which appears as plaintiff's Exhibit No. 7, and you list two names as sons.

During the year 1942 how much did you contribute to the support of these two individuals that you have named as sons?

A. A few hundred dollars.

Q. A few hundred dollars. Do you have any receipts?

A. No, I do not have it now. I lost them all.

Q. When did you lose them?

A. They weren't of any use to me. I don't know where I put them.

Q. How did you send money to China in 1942?

(Testimony of Wong Hai.)

A. At that time I couldn't send my money because it was war time.

Q. Then you did not send any money to China in 1942, is that right?

A. It was because of the war. I cannot send money there then, and therefore I did not send any. [54]

Q. Then your previous answer "few hundred dollars" was not correct, is that right?

A. I thought you meant how much money I sent each year in those old days.

Q. On Plaintiff's Exhibit No. 7 you claim a deduction of \$385 for each dependent, or a total of \$770. That is correct, is it not?

A. That was the report I submitted.

Q. In 1942?

A. I couldn't help it if I couldn't send any money to China in those days.

Q. How much money did you send to China in 1943 for the support of your—withdraw that.

In 1943, according to Plaintiff's Exhibit No. 7, you listed as dependents 3 names, Wong Fay Kong, Wong Kai Kong, and Lou Shee.

The two you claimed as sons and the third you claim as wife.

How much did you send to China in 1943?

A. I didn't send any money. I wasn't able to because of the war.

Q. You claimed a deduction of \$1,155 for dependents in 1943, is that right?

A. I just couldn't send any money home.

(Testimony of Wong Hai.)

Q. Did you file an income tax return in [55] 1944? A. Yes, I did.

Q. Did you claim any dependents in 1944?

A. I only claimed the younger son and my wife because my older boy was of age.

Q. Do you have any receipts of any kind showing the transmission of money to China at any time since 1926?

Mr. Fusco: Asked and answered, your Honor.

The Court: He may answer. Objection overruled.

A. No, I did not keep that.

Mr. Collett: You have testified that there were two children that were born. The second son was born after you returned to the United States.

How did you know that the second son was born?

A. I received a letter from my home. They told me so.

Q. From whom? A. My wife.

Q. When?

A. It was after the birth of the child. I cannot remember exactly when now.

Q. What year?

A. It was either in 1926 or '27—in C.R. 16.

Q. Do you have the letter? A. No.

Q. Do you have any correspondence received from your alleged wife? [56]

A. No, I do not keep them.

Q. I am referring to at any time since 1926 to date, do you have any correspondence, any letter received from your wife? A. I received some.

Q. The question is, do you have a letter, any let-

(Testimony of Wong Hai.)

ter received from your wife from 1926 to right now? A. No.

Q. Referring to Plaintiff's Exhibits for Identification 3, 4, 5 and 6, do you recall these papers?

A. Yes.

Mr. Collett: Counsel, I take it the paper attached to it is the English translation of the contents.

Don't you know?

Mr. Fusco: I do know. I do know.

The Court: To your knowledge it is an accurate translation?

Mr. Fusco: Yes, your Honor.

Mr. Collett: Referring to Exhibit 3 for Identification, it states, "C.R. 33—6-22, August 10, 1944."

When did you come into possession of this document?

A. It has been a long time ago. I cannot remember now.

Q. How long ago?

A. He finished school quite some time ago. I cannot remember exactly what year that was. I do not remember. [57]

Q. Did you have this in 1951?

The Interpreter: Forty what?

Mr. Collett: 1951.

A. 1951. That must be about—maybe about that time that he sent me.

Q. Well, do you remember whether or not you had it in 1951?

A. About that time, I can't remember exactly.

Q. How did you receive it?

(Testimony of Wong Hai.)

A. The Immigration Officer told me to get those report cards in order to present them as evidence, and in the aid to that I wrote home and sent for them.

Q. Oh, you wrote to whom?

A. I wrote home to my wife, told her to find those documents.

Q. Did she send it to you? A. Yes.

Q. In the letter? A. Yes.

Q. Do you have the letter?

A. No, the report cards were sent to me without any letter.

Q. Do you have the envelope?

A. I don't know where I placed them now.

Q. Did you ever show this document to the Immigration officials? A. No, I didn't. [58]

Q. Why not? A. They didn't ask me.

Q. You stated that they asked you to get it?

A. They asked for it, but I didn't have it. How can I present it when I don't have it?

Q. Why didn't you present it after you got it?

A. I don't know whether I was supposed to submit them. I just turned them over to my attorney.

Q. When? A. I cannot remember now.

Q. How soon after the Immigration said to you to get the so-called reports did you receive these documents? A. A few months.

Q. What year was it? A. 1951.

Q. This Exhibit 3 has the date of August 10, 1944. You did not receive it in 1944, that's correct, isn't it?

(Testimony of Wong Hai.)

Mr. Fusco: Your Honor, I object to that. Plaintiff has already answered that question and has already stated that——

The Court: What question?

Mr. Fusco: That they were all received after 1951.

Mr. Collett: No, no, he hasn't stated anything like that. [59]

The Court: Proceed.

Q. (By Mr. Collett): Plaintiff's Exhibit 3, do you understand what I mean by Plaintiff's Exhibit 3?

The Court: Show it to him and ask him if he ever saw it before.

Mr. Collett: He has testified, if the Court please——

Q. (By Mr. Collett): You did not receive this document which is entitled Plaintiff's Exhibit 3 in August, 1944? A. No.

Q. You said you received that in 1951?

A. Yes.

Q. Referring now to Plaintiff's Exhibit 4, when did you receive this?

A. It was not sent to me individually. It was sent all together at one time in 1951.

The Court: We will take a recess.

(Short recess taken.)

Q. (By Mr. Collett): It is your testimony that these documents which have been identified as Plaintiff's 3, 4, 5 and 6, these school reports, were all

(Testimony of Wong Hai.)

received at the same time, is that correct?

A. Yes.

Q. And you say that that was some time in 1951?

A. About that time. I cannot quite remember now.

Q. At no time were they shown to the officials of [60] immigration? A. No.

Q. You told us this morning that you had received them individually year after year while the boy was attending school. That isn't true, is it?

A. Not year after year. They were all sent to me at one time.

Q. Well, you told us this morning that they were received year after year.

A. I didn't say that. I said it was sent to me at one time.

Q. Was that your recollection of your testimony this morning?

A. I think that is what I said this morning, that I think they were sent all together to me.

Q. The truth is, they were not received one at a time individually while the boy was at school, that is not true, is it?

A. I didn't say that those were sent to me individually one by one each year.

Q. Well, it is not true they were received one by one each year? A. Yes.

Q. Did they all come to you in the same envelope? A. Yes. [61]

(Testimony of Wong Hai.)

Q. Are you sure that you received them from China? A. Yes.

Q. You don't have the envelope in which they were sent to you? A. I don't have it now.

Q. At the time that Wong Gong Fay was, you claim he was born, where were your brothers?

A. They were in Toi Shan City.

Q. Were they present at the time of the birth?

A. No.

Q. Did they see the child at any time prior to your departure from China?

A. I don't know whether they did or not.

Q. When did you leave Hong Kong returning to the United States? A. 1926.

Q. Do you recall the month that you left Hong Kong?

A. I arrived at San Francisco on December 15. I left Hong Kong in November. Chinese reckoning should be the tenth month.

Q. When did you leave Toi Shan City?

A. The ninth or tenth month, Chinese reckoning.

Q. Ninth or tenth month.

Give us the complete date so we can translate it.

A. October, November, December. [62]

Mr. Collett: I didn't understand that.

The Interpreter: Ninth month, first day, was the 7th of October, 1926. The last day of 11th month of C.R. 15 is January 3, 1927.

Mr. Collett: What is the 1927 date?

The Interpreter: The last day of the 11th month of C.R. 15 was January 27—January 3, 1927.

(Testimony of Wong Hai.)

Mr. Collett: What happened on January 3, 1927?

The Interpreter: How do you mean, sir?

Mr. Collett: Perhaps we got a little confused. You came up with a date in 1927. You got him arriving December, 1926, and I think he used the ninth and tenth month—ninth and tenth month, and I was endeavoring to find out what the ninth and tenth month——

The Interpreter: Oh, the ninth and tenth month, you want? C.R. 15 was October 7, 1926. The last day of the tenth month of C.R. 15 was December 4, 1926.

The Court: He wants to know what happened on that day.

Mr. Collett: No. I will withdraw that, if the Court please. We got into January the 3rd, and I didn't know what happened on January the 3rd. That's why I asked.

C.R. 15—let's get this straight—C.R. 15, ten, tenth month, is October the 27?

The Interpreter: Would you like to get the equivalent [63] of the tenth month from the last day to the first day?

Mr. Collett: Strike it.

Give me the Chinese calendar date for the time of your departure from Toi Shan City?

A. About the ninth or tenth month of C.R. 15.

Q. What is that in the American calendar?

A. That is the day I left the village?

Mr. Collett: That's the date.

The Interpreter: He left Toi Shan City——

(Testimony of Wong Hai.)

Mr. Collett: It's the ninth or tenth month of C.R. 15. Now I am trying to get the equivalent of——

The Interpreter: The first day of the ninth month, C.R. 15, was October 7, 1926. The last day of the tenth month of C.R. 15 was December 4, 1926.

Mr. Collett: In other words, you are telling us that it was between October the 7th and December the 4th of 1926? A. Yes.

Q. How long did you stay in Hong Kong prior to the departure of the ship?

A. A few weeks, about three or so. About three weeks.

Q. And do you recall how long the trip was from Hong Kong to San Francisco?

A. A little over three weeks.

Mr. Collett: That is all.

Mr. Fusco: Just one more question. [64]

The Court: What's that?

Mr. Fusco: Just one more question that I want to ask him.

The Court: All right.

Redirect Examination

By Mr. Fusco:

Q. Do you have a certificate of identity?

A. Yes.

Mr. Fusco: May we have it, please?

(Document produced by counsel.)

(Testimony of Wong Hai.)

Mr. Fusco: Do you recognize that?

A. Yes.

Mr. Fusco: May I enter this as an exhibit?

The Court: What is that?

Mr. Fusco: That is a certificate of identity.

The Court: What is the basis of it? What is the foundation? Where did it come from? Tell us all about it.

Mr. Fusco: Beg your pardon. Yes, your Honor.

Mr. Fusco: Mr. Wong Hai, when did you receive this?

A. Soon after I returned from Hong Kong.

Q. And it was given to you by whom?

A. I don't exactly know. It must have been the Immigration Service.

Mr. Fusco: That is all.

The Court: Are you offering this in evidence?

Mr. Fusco: Yes, I am. [65]

The Court: It will be admitted and marked.

Mr. Fusco: That is all, your Honor, of this witness.

The Clerk: Plaintiff's Exhibit 8 admitted and filed in evidence.

(Thereupon Certificate of Identity, Wong Hai, admitted and marked in evidence as Plaintiff's Exhibit 8.)

(Witness excused.)

Mr. Fusco: Our next witness will be Wong Gong Fay, the plaintiff.

WONG GONG FAY

plaintiff herein, called on his own behalf, sworn through the Interpreter, testified as follows:

(The following questions and answers were through the Interpreter.)

The Court: Ask him his full name, please.

A. Wong Gong Fay.

The Court: Where do you live?

A. Now?

The Court: Yes.

A. In Sacramento.

The Court: What is his business or occupation?

A. I work in a laundry for a friend.

The Court: Was he here in Court this [66] morning?

A. No, he is not here. He is in Sacramento.

The Court: This morning?

A. No.

The Court: I thought the witness was in Court this morning.

Mr. Fusco: Oh, pardon me, I thought you meant the friend. His friend.

The Court: Or why didn't he remain outside the courtroom when he was ordered to?

Mr. Collett: This is the plaintiff.

The Court: I thought he was a witness.

Mr. Collett: No.

Mr. Fusco: No.

Mr. Collett: May we at this time ascertain any familiarity with the English language?

(Testimony of Wong Gong Fay.)

The Court: Ask him how long he has been in this country.

A. About two years.

The Court: Where did you come from?

A. Hong Kong.

The Court: And did he go to school in Hong Kong?

A. No, sir.

The Court: Have you talked to this witness?

Mr. Fusco: Yes, your Honor.

The Court: Does he understand English?

Mr. Fusco: I have had to converse with him through an [67] interpreter. I find his English is very bad.

The Court: Proceed.

Direct Examination

By Mr. Fusco:

Q. What is your full name?

A. Wong Gong Fay.

Q. What is your age? A. 28 years old.

Q. Where were you born? A. In China.

Q. What city? A. Toi Shan City.

Q. What was the date of your birth?

A. Date of birth?

The Interpreter: Yes.

A. C.R. 15.

Mr. Fusco: Do you have any birth certificates or documents giving evidence of your birth?

A. No. In China we don't have it.

(Testimony of Wong Gong Fay.)

Q. How do you know your age?

A. I don't know about my age. I ought to know my own age.

The Court: How does he know his age?

A. I remember it.

Mr. Fusco: Who told you?

A. Because at the present time I do not have to know. I do not have to have somebody tell me how old I am. I can [68] calculate that myself. But, of course, when I was young, my mother told me how old I was.

Q. Do you have any brothers or sisters?

A. Including myself, I have two brothers.

Q. What is your mother's name?

A. My mother?

Q. Yes.

A. I heard her name was Chin Gum.

Q. You don't call your mother by name, do you?

A. No.

Q. What is your brother's name?

A. Kai Gong.

Q. When did you first learn the name of your brother?

A. When I was young, I didn't know. I found out when I was mature.

Q. Do you know you know your father's father, his name? A. Lee Dun Nu.

Q. Did you know your mother's mother or know her name? A. No.

Q. Did you ever see them?

A. When I was young, I did.

(Testimony of Wong Gong Fay.)

Q. Are they living or dead?

A. Now, at the present time? Who do you refer to?

Q. Your mother's mother and your mother's father? A. Both together or—— [69]

Q. Well—one at a time.

A. My maternal grandmother is alive and my maternal grandfather is dead.

Q. Do you know if your father has any brothers or sisters?

Mr. Collett: I object to that question, if the Court please, because it calls for purely hearsay.

The Court: If he knows, that's the question.

Mr. Fusco: That's all. That's all.

Q. (By Mr. Fusco): Have you ever seen them?

A. No.

Q. Did you ever see your father in China?

A. You mean my own father?

Q. Yes.

A. When I was born, he was in China, but I didn't know any better.

Q. When did you see your father the first time?

Mr. Collett: I understood, if the Court please—there is an objection to the use of the term "father." That is purely hearsay, as far as this witness is concerned.

The Court: The objection will be sustained. Proceed.

Mr. Fusco: When did you see Wong Hai the first time? A. Where, do you mean?

(Testimony of Wong Gong Fay.)

Q. Where and when did you see him the first time?

A. When I was young, after my birth. I was too young to know, but I saw him when I came to the United States. [70]

Q. Did you go to school?

A. You mean here or elsewhere?

Q. Did you ever go to school?

A. Yes, I attended Chinese schools.

Q. Where did you go to school?

A. In the village next to mine.

Q. I ask you to look at these documents. Do you recognize them? A. Yes.

Q. What are they?

A. These are report cards from school.

Q. Whose are they? Do you recognize the signatures or the writing, the Chinese writing, what does that purport to be?

Mr. Collett: Object to the question; what it purports to be. The documents speak for themselves.

The Court: If he knows. I don't know what they are.

A. These characters are here in the case where I was born and where I lived.

Mr. Fusco: When did you leave Toi Shan the last time?

A. You mean the time when I left there to come to the United States?

Q. Yes. A. In C.R. 35.

Q. Who sent you the money for your voyage?

Mr. Collett: I object, if the Court please, who

(Testimony of Wong Gong Fay.)

sent [71] the money. No proper foundation laid.

Mr. Fusco: I am just asking how he got his passage. I can reframe my question. I just want to ask the source.

The Court: I will overrule the objection. Ask him.

A. My father.

Mr. Fusco: That is all, your Honor.

Mr. Collett: Well, I will ask that that answer be stricken, if the Court please, by the previous ruling of the Court, saying that his father sent him is no foundation laid whatsoever for it.

The Court: What foundation have you in mind?

Mr. Collett: That is, who sent the money.

The Court: He said his father.

Mr. Collett: But he is again testifying with regard to his father.

The Court: He calls him his father.

Mr. Collett: But the proper showing would be the receipt of something in Chinese.

The Court: You can cross-examine him on that. I don't know whether he has got a receipt of it.

Mr. Collett: The answer is purely hearsay.

The Court: I will allow the answer to stand. If there is any question about it, you may cross-examine.

Cross-Examination

By Mr. Collett:

Q. You say you left Toi Shan City in [72]
C.R. 35? A. Yes.

(Testimony of Wong Gong Fay.)

Q. What month and day, if you remember?

A. I cannot remember the exact date, but it was on the fifth month.

Q. The fifth month of C.R. 35. What is that American style?

The Interpreter: From May 31 to June 29, 1946.

Mr. Collett: 1946.

Q. (By Mr. Collett): And you went from Toi Shan City to where?

A. I went to Hong Kong.

Q. Did you live continuously in Hong Kong from 1946 to 1951?

A. Yes, I was in Hong Kong.

Q. Continuously?

A. Yes. I stayed there until I left for the United States.

Q. Have you been in any other part of China?

A. What period are you referring to?

Q. At any time.

A. No. When I was young I was going to school.

Mr. Collett: What dialect is he speaking, Mr. Interpreter?

The Interpreter: Toi Shan.

Mr. Collett: The only two places, except for the period of going from one place to the other, that you have been, is in Toi Shan City and Hong Kong, is that correct? [73]

A. I was born in Toi Shan City, but later lived in the village.

Q. You lived in the village?

A. Yes.

Q. What village?

A. Leung Chew. At home.

(Testimony of Wong Gong Fay.)

Q. Where is it with reference to Toi Shan City?

A. You mean my village?

Q. Yes. A. Four to five lis.

Q. In which direction from Toi Shan City?

Mr. Collett: Did you answer?

The Interpreter: No. He just repeated my question, that's all.

The Court: Ask him again.

A. I am not clear about that.

Mr. Collett: When you went from Toi Shan City to Hong Kong, how did you go?

A. I boarded a bus from Toi Shan City to Seong Cheong City, and then from there by boat to Hong Kong.

Q. How do you spell that intervening city?

A. Seong Cheong.

Mr. Collett: Seong Cheong?

The Court: Maybe the witness can find it for you.

Q. (By Mr. Collett): During the time that you were living [74] in the village, were the Japanese in that town at any time? A. Yes.

Q. When did you first see any Japanese in your village?

A. I really couldn't remember exactly now. We fled from the village quite a few times.

Q. There were Japanese actually in your village? A. Yes.

Q. Do you remember the year?

A. I cannot remember.

Q. Have you at any time been in any other city

(Testimony of Wong Gong Fay.)

or town in China than Toi Shan City, your village and Hong Kong? A. No.

Q. You are speaking Toi Shan dialect now, is that correct? A. Yes.

Q. Do you speak any other dialect?

A. No, sir.

Q. What did you do while you were in Hong Kong from 1946 to 1951?

A. When I first went out there I worked.

Q. Where? A. At the Boh Geong Store.

Q. Where did you live?

A. At the place where I worked.

Q. How long did you work there?

A. Few years. [75]

Q. Well, how many years?

A. I worked there until I left for the United States.

Q. Did you work continuously in that place from the time you arrived there until you left for the United States?

A. Yes, I worked there, but I later also worked across the Bay.

The Court: In Oakland?

The Witness: No, sir.

Q. (By Mr. Collett): What do you mean by "across the bay"? A. Kaloon.

Q. When did you go to work at Kaloon?

A. In C. R. 36—1949.

Q. How long did you work in Kaloon?

A. I worked there until the latter part of C. R.

(Testimony of Wong Gong Fay.)

Q. How many months did you work there?

A. About a year or so.

Q. For whom did you work there?

A. For a friend.

Q. What was the name of the friend?

A. Lee Fong.

Q. You said you received some money from the United States. How did you receive that money?

A. What kind of money are you referring to?

Q. Money that you received from the United States.

A. You mean the money that my father sent to me? [76]

Q. I am speaking about money you received from the United States.

A. It was the money sent to me from the United States. It couldn't be any other person than my father.

Q. When did you first receive any money from the United States.

A. I can hardly remember which was the first time, because I often received money from my father.

Q. Do you have any letter or receipt or paper to show money that you received from the United States?

A. I had some letters that my father sent to me and also the checks, but the checks were cashed and I did not bring any letter with me when I left for the United States.

(Testimony of Wong Gong Fay.)

The Court: We will take the adjournment until ten o'clock tomorrow morning.

(Whereupon an adjournment was taken until the hour of 10:00 o'clock a.m., Friday, May 8, 1953.) [77]

FRIDAY, MAY 8th, 1953—10:00 A.M.

WONG GONG FAY

resumed the stand in his own behalf, having been previously sworn through the Interpreter, testified further as follows:

Cross-Examination

(Resumed)

By Mr. Collett:

Q. You have told us that in June, 1946, you went to Hong Kong and that you worked in Hong Kong until 1950; that you went over to Kaloan and went to work.

What kind of work did you do in Hong Kong?

A. I was working in the weaving factory.

Q. What kind of a factory? A. Weaving.

Q. What kind of weaving? A. Towels.

Q. Had you engaged in weaving towels prior to that time that you went to Hong Kong?

A. No.

Q. That was the first time you engaged in such the time that you went to Hong Kong?

Q. Was that the first type of employment that you had in Hong Kong?

(Testimony of Wong Gong Fay.)

A. No. I was not engaged in that sort of work when I was in Hong Kong. I started to work in the weaving factory when I [78] was in Kaloon.

Q. I previously asked you what you were doing in Hong Kong and you told us that you were weaving towels in Hong Kong. Now you say you didn't weave towels in Hong Kong, that it was Kaloon, is that right?

A. Yes. I did not work in the weaving factory in Kaloon until I went there. At first when I was in Hong Kong I worked as a service boy for the Bow Geong Company.

Q. Didn't you understand my first question when I asked you what sort of work you were doing in Hong Kong?

A. Yes. I thought you were talking about Kaloon.

Q. How soon after you arrived in Hong Kong did you go to work?

A. Soon after I arrived at Hong Kong and stayed there for about a week I started to work for the Company.

Q. That was in C. R. 35, as you previously testified. Now, you say you went to Kaloon in C. R. 39?

A. C. R. 39.

Q. You previously told us it was C. R. 39. C. R. 39 was not the correct year, was that right?

A. C. R. 38 is correct.

Q. What month?

A. I cannot remember it now. It was in C.R. 38.

Q. What season of the year?

(Testimony of Wong Gong Fay.)

A. I cannot remember now. I can only remember it was in [79] C. R. 38.

Q. During the time you were in Hong Kong, did you ever leave Hong Kong to go anywhere else in China? A. No.

Q. You did not leave Hong Kong at any time during the period from June of 1946 or C. R. 35 to C. R. 38, when you went over to Kaloan, is that right? A. Yes.

Q. After you went over to Hong Kong, how long did you stay there?

A. Until the latter part of C. R. 39. I then returned to Hong Kong and started arrangements to come to the United States.

Q. C. R. 39 is 1950, is that correct, Mr. Interpreter?

The Interpreter: Yes, sir.

Q. (By Mr. Collett): Do you recall what month it was in C. R. 39?

A. The latter part of the tenth month.

Q. That would be which month in the American calendar?

The Interpreter: The 1st part of December, 1950.

Mr. Collett: December?

The Interpreter: Yes, sir.

Q. (By Mr. Collett): Both Kaloan and Hong Kong are within the area that is controlled by the British, is that correct?

A. I really can't understand fully about who is being [80] controlled over such land. I was only a

(Testimony of Wong Gong Fay.)

country boy. I came out from inland China.

Q. During the time from C. R. 38 to December 1950, C. R. 39, did you at any time cross from the area in which the British Government was in control over to the area in which the Chinese Government was in control? A. No.

Q. Then for the entire period from when you left Toi Shan City, June, 1946, until you left Hong Kong to come to the United States, you were either in Hong Kong or Kaloon? A. Yes, sir.

Q. Where do you live now? A. Now?

Q. Yes. A. In Sacramento.

Q. What address?

A. 904 Second Street, the Sing Cheong Laundry.

Q. Is that where you work?

A. I do not consider myself working there as a permanent worker. I help out in the laundry.

Q. Well, have you been working there every day for the past month? A. Yes, sir.

Q. Have you been working there every day for the past six months? [81]

A. Yes, I have been there all the time.

Q. Well, have you been working there for the past year? A. Yes.

Q. What kind of work do you do?

A. Forwarding the clothing, wrapping them up, and divide laundry for washing.

Q. What time do you go to work in the morning?

A. I do not have a set time to work there. I go there whenever I wish.

(Testimony of Wong Gong Fay.)

Q. Well, do you live—strike that.

Do you sleep at that laundry? A. Yes, sir.

Q. Do you eat your meals there?

A. Yes, sir.

Q. Who operates the laundry?

A. It is a partnership business.

Q. What are the names of the partners?

A. Some person of the Chin family.

Q. Which family?

A. Chin, (Spelling)—Lee. (Spelling) L-e-e and Yung (Spelling) Y-u-n-g.

Q. Who employed you?

A. After I was admitted, my father told me to go there to work, and he said his friend there was Mr. Chin.

Q. Do you recall the date that you arrived in San Francisco? [82]

A. I think it was on April 22, 1951.

Q. And when were you released by the Immigration officers?

A. Chinese Reckoning, that was in C. R. 40, which was 1951, I was permitted to come.

Q. 1951, what month? A. April.

Q. April the 22, 1951, you say you arrived in the United States. When were you released by the Immigration—do you understand? First, you understand who I mean by the Immigration Officers?

A. Immigration what?

Q. The Immigration officers.

A. You mean in the United States?

Q. San Francisco. A. Yes, sir.

(Testimony of Wong Gong Fay.)

Q. You were in custody for a period of time after you arrived in San Francisco, is that not true? A. Yes, sir.

Q. Do you recall where you were?

A. At the the Immigration office.

Q. In San Francisco? A. Yes.

Q. Now the date that you were released from detention by Immigration, you recall the date that you were released?

A. I think it was on October, 1951. [83]

Q. October, 1951. Where did you go after you were released? A. I went to my father.

Q. Where?

A. At this Wing Heng Dong Company on Grant Avenue.

Q. And how long did you stay there?

A. About one week to two. But I did not live at the Wing Heng Dong Company.

Q. Where did you live?

A. I went to live in a hotel.

Q. You lived in a hotel for about one week after you were released from detention, is that right? A. A week or so.

Q. Then where did you go?

A. I went to Sacramento.

Q. When you first went to Sacramento, did you go to the Sing Cheong Laundry? A. Yes.

Q. And you have been at the Sing Cheong Laundry from that time up to the present time, is that correct? A. Yes.

Q. Did you come to San Francisco during the

(Testimony of Wong Gong Fay.)

period from about November, 1951, to the present time? Did you come to San Francisco?

A. Yes, occasionally.

Q. How many times? [84]

A. I came out quite often. I cannot remember how many times now.

Q. Since the first of January of 1953, this year, how many times have you been in San Francisco?

A. I cannot remember how many times now, but I had been in San Francisco for visits.

Q. When did you come down from Sacramento for the purpose of this trial?

A. Sometime—I came out here for a visit.

Q. During the time that you lived in a hotel, the week after you were released, with whom did you live?

A. I lived there alone.

Mr. Collett: That is all.

(Witness excused.)

Mr. Fusco: If your Honor please, Exhibit 1, may I ask that it be admitted in evidence and made a part of the record?

The Court: Admitted and marked.

Mr. Fusco: Likewise I ask that Exhibits 2, 3, 4, 5 and 6, which purport to be authenticated report cards of the plaintiff Wong Gong Fay, may I ask they be introduced in evidence?

Mr. Collett: Object, if the Court please. There is no foundation for those documents.

The Court: Why are you objecting? What is the reason for it? Make your record. [85]

Mr. Collett: Well, if the Court please, there has been no showing as to when they were received, except on cross-examination, an indication that they may have all been received at once. There is no other testimony except that he received them by mail. First it was that they were received for each year and that was denied and changed and testified that they were all received in one group. And furthermore, they are immaterial, irrelevant, incompetent, as to the facts in issue before this Court, and self-serving, and upon those grounds, I object.

The Court: I will allow them in. Objection overruled.

(Thereupon Exhibits 1, 2, 3, 4, 5 and 6, heretofore marked for Identification, were received in evidence and marked respectively Plaintiff's Exhibits 1, 2, 3, 4, 5 and 6.)

Mr. Fusco: May I ask that Exhibit No. 7, a copy of the witness' Wong Hai's tax return, be admitted in evidence?

The Court: Admitted and marked.

Mr. Collett: No objection.

(Thereupon Exhibit 7, heretofore marked for Identification, received in evidence and marked Plaintiff's Exhibit No. 7 in evidence.)

Mr. Fusco: I wish to present my next witness, your Honor. Mr. Chin Young Fay.

I don't know what happened to our witness. If he is not here now, I will submit it. [86]

That is my case, your Honor. The witness is not here. Submit the case.

Mr. Collett: Your Honor, this is a case in which the action is against the Attorney General of the United States, which of course that means that upon the plaintiff's approach to the borders of the United States, Immigration conducted hearings with regard to that claim. A board of special inquiry appeal was dismissed. There is therefore a record, as far as Immigration is concerned.

Now, although the case of Wong Wing Phew, in the Court of Appeals for this District, has given us an indication that in cases where the claimant came in by passport, which is under at least a partial cloak of citizenship, that the denial of immigration gives rise to a right to file under Section 903-A an independent action. In cases where the individual comes in by a certificate of identity, as in this case, or travel documentation, the claim is not under the guise of citizenship, but is simply for purposes of having immigration ascertain whether or not the claimant is valid in his claim.

Under the Wei Ying Og Case, which is discussed at length in the Ly Shue Case, in the opinion of Judge Goodman, Judge Hotzoff, in holding that although habeas corpus may have been resorted to by the claimant, that nevertheless he could file an action under 903 which was in the nature of a proceeding de novo. We distinguish the proceeding de novo from an independent action in that de novo relates it to proceedings such as in admiralty or in equity whereafter a determination by a board

or an administrative agency, the Court may hear the evidence and may hear additional evidence, but also takes the record which appeared, which was presented to the administrative agency, and reaches its own conclusion at the conclusion of the trial.

With that in mind, I offer into evidence the Immigration record. I feel that it should be offered to the Court, and, if counsel objects, the Court can make its ruling accordingly, but I feel that it is incumbent upon the defense to offer the record of Immigration for whatever purpose the Court may use it.

Mr. Fusco: Your Honor, I object to the admission of this Immigration record on the basis of Wong Wing Phew. Trial de novo means exactly what it says, de novo, a new trial. It means a new trial. We are entitled to a new trial, and I object on those grounds.

The Court: The objection will be sustained.

Mr. Collett: There is no further evidence, if the Court please. The matter is submitted as to the evidence.

Mr. Fusco: The matter is submitted.

The Court: You may argue your case, if you wish.

(Thereupon arguments of counsel presented.)

The Court: The judgment will be entered for the defendant, upon findings of fact and conclusions of law.

Prepare the judgment and findings for this record.

How long will it take you to do that?

Mr. Collett: The period, in accordance with the local rules, if the Court please, is five days. They will be filed within five days.

The Court: Put the case over a week.

That is all.

[Endorsed]: Filed August 6, 1953. [89]

The United States District Court, Northern District
of California, Southern Division

No. 30960

Before: Hon. George B. Harris, Judge.

WONG GONG FAY,

Plaintiff,

vs.

J. HOWARD McGRATH, as Attorney General of
the United States,

Defendant.

No. 31316

LEO WING ON and LEO WING WAH,

Plaintiffs,

vs.

J. HOWARD McGRATH, as Attorney General of
the United States,

Defendant.

REPORTER'S TRANSCRIPT

Tuesday, February 3, 1953

ARGUMENT OF MR. SING

The Court: I notice, Mr. Hertogs, the gentleman with you has five or six cases of a like nature.

Mr. Hertogs: Yes, Mr. Sing.

The Court: Do you have any comment to make on this motion, because I am going to give it very serious consideration?

Mr. Sing: May it please the Court, Mr. Collett mentioned our cases, too. I have already submitted points and authorities in support of our motion for substitution and in opposition to Mr. Collett's motion to dismiss.

Mr. Collett: Did you file those this morning?

Mr. Sing: I filed them yesterday.

The Court: Will you get those authorities? What, if any, authorities did you submit other than the two?

Mr. Sing: As for authorities, counsel for the defendant in that case opposed our motion for a substitution, basing his whole opposition on one case of *Snyder vs. Buck* and also that Rule 6(b) does not permit the Court to extend time under Section 25(b) of the Federal Rules of Civil Procedure.

In our memorandum I have already set out that the set of facts in the defendant's case of *Snyder vs. Buck* is completely different than in the cases at bar. Mr. Fusco [2*] has already dwelled upon that point, so we won't go into that point.

Mr. Hertogs mentioned the case of *Fleming vs. Goodwin*, that was the case cited in 165 Fed. (2nd) 334. That explains the purpose of Section 25(b). That was a case where the action was filed six

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

months after. That goes in point with our cases. It was the contention of the defendant that it was not timely filed. The Court in that case granted the motion for substitution and held that if they held that such rule abated the case it would be to glorify form over substance. And it goes on to say that the purpose of the Federal Rules of Civil Procedure was to provide for continuance of an action that was personal in nature and it covers only those actions in which a public officer is a party and would abate upon his separation from office. In our cases the action continues.

Then the case of *Fleming vs. Peoples Natural Gas Company* in 8 FRD, 42, following *Fleming vs. Goodwin*, granted a motion for substitution which was also filed after the six months' limitation period.

The Court: Those cases are set forth in your memorandum?

Mr. Sing: Yes, in the memorandum in Civil Case 30127, *Lew Scheck Shan and Lew Sheck Tune vs. McGrath*.

Then counsel for the defendant goes on to motion Rule 6(b) of the Federal Rules of Civil Procedure. This rule gives [3] the Court the discretion to enlarge the time limit and it also goes to the extent of giving the Court the right to revive it after it has expired. And in *Barron vs. Holtzoff*, Federal Rules of Civil Procedure, it was pointed out that the purpose of the rule was to divest the Court of jurisdiction to entertain motions for a new trial and also on the time limit of taking the appeal. And even in those limitations of time limit for taking

an appeal and time limit on motions for a new trial, the Court there had also extended and enlarged the time limit where they showed excusable neglect.

Then the Court goes on to say in *United States vs. Saunders Petroleum Company*, 7 FRD, 608, that the Statute and Rules relating to substitution of successors is procedural only, it doesn't affect the substantive rights of the parties, and where the official had no personal interest in the subject matter and there was no change in the cause of action, substitution of parties is always allowed.

Then as to cases where the six months' limitation applies, *Ralph De Oench Company vs. Woods*, 171 Fed. (2nd) 112 says that the six months' limitation for substitution of successor in public office applies only to actions which are of a nature that they would abate on separation from office.

Mr. Collett has mentioned the fact of skipping from one party to another party; that between the time Mr. McGrath went out and Mr. McGranery went in, Phillip Pearlman was [4] acting attorney general for some time, too. However, there is a case of *Bowles vs. Goldman*, 7 FRD 12, where Chester Bowles was the Housing Administrator at that time and he resigned as the public official and was succeeded by Paul Porter. No substitution was made by the plaintiff during this interval until Paul Porter resigned and then Phillip Fleming took over. In that case the defendant then objected to the substitution because Porter was not substituted and that they waited until Chester Bowles went

out, Porter went in, Porter went out and Fleming went in. But the Court in that case granted substitution also.

It has been held that the power of Federal Courts to amend pleadings in a matter of form at any stage is liberally construed. This is in the case of *United States vs. Koike* in 164 Fed. (2nd) 155.

And there is the case of *Seven Oaks vs. Federal Housing Administration*, 171 Fed. (2nd) 947. The Court in that case granted the substitution to the amendment of parties saying that there had been no change of the defendant in the case; that dismissal under Rule 25 was not necessary, and that the use of the public officer's name in our cases was a mere formality, and it is actually a suit against the Government, and regardless of the captions in our cases, the issues in our cases do not change, the real party is still the same and that the defendant J. Howard McGrath was named as a defendant at the time of the institution of the suit merely in his nominal capacity and as a representative for those purposes.

The Court: How did you happen to permit the time to lapse in your cases?

Mr. Sing: The cases were brought against J. Howard McGrath, and inasmuch as it was a case strictly against J. Howard McGrath in his representative capacity and it was a 503 action, we just felt that inasmuch as it was, why burden the courts with substitution when McGrath goes out, Pearlman goes in, and then McGranery comes in, and then we would be substituting Pearlman, we would

be substituting McGranery, and then we would be substituting Brownell, at the same time.

The Court: You considered the political aspects as well as the legal aspects, did you?

Mr. Sing: Yes, your Honor.

Mr. Collett: It looks like he was prophetic; he anticipated Mr. Brownell's appointment.

Mr. Sing: When Mr. McGranery was appointed attorney general, there was mention at the time that he was only going in for the purpose of clearing up what had to be cleared up and he would be out. It was not anticipated that Mr. McGranery would stay so long either.

Our purpose of substitution here is nothing more than [6] to keep the records straight, and it is merely an amendment taking one name out and putting someone else's name in. The defendant has always been the same.

The Court: It is not as easy as that. I suppose if lawyers ever have a purgatory or a hell that they go to, a lawyer's hell, they will be confronted when they reach the portals of that place with "Time, time"; there will be a man there with a great big club cracking his knuckles and he will say that you failed within 24 hours to do such and such. I think it shortens the lives of men; that in its philosophy of changing one political appointee to another political appointee Congress in its divine wisdom will see fit to permit a substitution, when, as it appears in this case, there may well be excusable neglect. California has some very benign legislation on the subject, when a man fails to do

something within a given period of time, he may under Section 437, as I recall, file an affidavit of excusable neglect. It is generally the lawyers dereliction and not the litigant's. And taking the case at bar in this matter before the Court, the Wong Gong Fay case—bear in mind I don't have a thing that I do not know a thing about the facts; all I read is the verified complaint—the complaint states that the plaintiff is in custody.

“Plaintiff has been and at all times herein stated is still being held in restraint and [7] he is being denied his liberty by the defendant in that the plaintiff is confined in the Immigration Detention Quarters at San Francisco, and further that the defendant”——

That is J. Howard McGrath—

“has ordered the plaintiff to be deported from the United States as an alien.

“That plaintiff's father, Wong Hie, is a citizen and national of the United States and is now a resident of the city and county of San Francisco, State of California, and further that plaintiff was born on May 16, 1926, in Toyshan, Kwangtung, China, and that the plaintiff herein is the natural and legitimate son of the above-named Wong Hie,”

and so forth.

“Paragraph 4. That plaintiff claims a right and privilege as a national and citizen of the United States * * *”

Paragraph 5. "That the plaintiff has prosecuted this action pursuant to the provisions of Section 503 of the Nationality Act of 1940

* * *"

When you place the verified petition or the complaint in juxtaposition to the matters of forfeiture of substantial rights or rights that allegedly are **substantial**, and weigh them in the balance, it seems to me that the matters of form should be relegated to the limbo of the past and that the matters of substance should be considered by these Courts.

I realize that legislation is there, and I am fairly conversant with many of these cases. However, I haven't read this 165 Fed. (2nd) 334. I should like, if possible, some very quick ruling from our Court of Appeals to set at rest in this Circuit the problem that besets and bedevils these Courts on these procedural matters.

I have a situation before me on six or seven cases of Mr. Petros and Mr. Purcell wherein abatement is sought, and I find extremely more difficulty in deciding these matters wherein substantial rights are being frittered away on account of some obscure statute than I do in deciding cases that run five and six months and even longer.

I, too, practiced law. I realize the difficulties sometime, although notice was given in the Recorder of the fateful consequences of the failure to live up to the statutory mandate.

Mr. Collett: If the Court please, I am mindful of the difficulties of the Court of Appeals with regard to rules and the time within which you do

this and do that and how gleefully, apparently, with regard to the United States of America of late, they have been willing on just the slightest deviation from the amount of time to dismiss an appeal which [9] is a perfectly righteous appeal.

Now the rules are there. In many instances they are local rules, rules of the Court of Appeals. They are specified as time within which you are supposed to docket, to file your statement of points, the designation of record, to authorize the printing of the transcript, and the difficulties that are there on the matter of getting time, which your Honor has characterized possibly at some time when we are endeavoring to pass over the Great River and somebody will be clubbing you with a heavy club, and I'm sure I'll be there getting my share of it, if your Honor please. But nevertheless, it is not the power of this Court to make the rules, and the rule specifically states the amount of time within which certain things should be done. And as I state again, there is not even an attempt here to present any excusable neglect or inadvertence.

The Court: Pardon me; this gentleman whose name escapes me at the moment——

Mr. Sing: Mr. Sing.

The Court: Mr. Sing.

Mr. Sing: Yes, your Honor.

The Court: He points out that he was considering the political winds of fate.

Mr. Collett: Prophetically.

The Court: He says he didn't know whether it was going [10] to be Mr. Pearlman or an appointee

of Mr. Truman or an appointee of Mr. Eisenhower. And there he was, conjuring up of course with fate and perhaps permitting his clients to go down the river and forfeit their rights. Still he was conjuring and his mental processes were working.

Mr. Collett: Conjuring or conjuring, maybe.

The Court: Be that as it may, I have indicated to the attorneys in these Courts, and I reiterate that I believe there are deeper problems involved in deciding the fate of litigants and the liberties of men apart from the trivia of some statute wherein a person's rights are forfeited because he or she failed to come in within one day or forty-eight hours. And our liberal thinking in the liberal rules of procedure has exemplified the thoughts of our more forward looking Federal Judges in that connection.

I can't conceive that any of my brethren in the Court of Appeals gleefully dismiss appeals or gleefully do anything. I know sometimes they roll in torment over the problems that beset them on procedure. But I have said enough.

Mr. Fusco: I may add in closing that the problem as counsel has stated it is not too complex. We need not go into the question of time in respect to appeals, motions for a new trial. That all goes to matters where a person has had his day in Court.

The Court: Counsel, I have heard sufficient now.

Mr. Fusco: Yes, I realize that.

Mr. Hertogs: If the Court please, if I may say something, just changing the subject a little bit

here. As the Court is well aware, I have a number of motions under submission.

The Court: What are your motions?

Mr. Hertogs: That is for change of party in defendants in those cases, you remember those 212 cases.

The Court: You appeared in the Court of Appeals only the other day.

Mr. Hertogs: Yesterday.

The Court: What, if any, requirements were exacted of you in the Court of Appeals?

Mr. Hertogs: Their exact word that was used, which was furnished Judge Mathews by Judge Orr was "perfunctory"—

Mr. Collett: Which I challenge.

Mr. Hertogs: Which he challenged and I accepted.

The Court: Judge Mathews said it was perfunctory?

Mr. Hertogs: He didn't rule; we will probably have a ruling today or tomorrow, your Honor.

The Court: I would like to see that ruling.

Mr. Hertogs: And I took the exact language that I used in this Court, the verbiage that I used in this Court, on this motion in the Court of Appeals, so I would not have to prepare affidavits in 230 cases. [12]

The Court: I will look forward to that ruling.

Mr. Collett: If the Court please, I mentioned reading the complaint about a man being in detention. The man is not in detention; is that right?

Mr. Fusco: No.

Mr. Collett: Would you set the Court straight on that, Mr. Fusco?

The Court: I read from your petition. Is the man in custody?

Mr. Fusco: No, your Honor, I intended to discuss that, but other counsel interrupted. The man is not in detention; he has been out on bail. Bail has been provided.

Mr. Collett: If the Court please, I appreciate your Honor's consideration on the allegations of the complaint, but as I have stated, we have checked the record; there are 716 of these cases pending right here before this Court.

The Court: I realize that.

Mr. Collett: In each one of the cases as they have been proposed, why, it is on allegations of the complaint. A great many of them, we feel satisfied, are without proper foundation; but I have in mind that as I stated before——

The Court: That may well be, but let us assume that this gentleman has merit to his petition.

Mr. Collett: That may well be. The rules are still there, and this Court is here to apply the rules and it is up to counsel and plaintiff to see that their rights are properly taken care of and that they timely make the necessary motions that they have to present. It has both ways. The rule is there. Just as it is necessary to file your notice of appeal within a certain time; if you don't, you don't have an appeal.

The point I was going to make with this thing is the dual aspect of it. It is there on one hand

that this Court is looking to the individual; on the other hand it is the duty that is imposed upon this Court in the interests of its responsibilities as a Judge to apply the rules that Superior Courts as well as the Congress of the United States may have established.

Now in this particular instance for the Court to rule anything other than in accordance with the rule is to say that the rule isn't there, doesn't mean anything; it doesn't mean a thing; you don't have to substitute any party; there is no necessity for it; you must completely disregard the rule.

The Court: Well, the matter may be submitted.

[Endorsed]: Filed June 10, 1953. [14]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorney for the appellant:

Docket entries.

Complaint.

Answer.

Supplemental pleading and motion to substitute party defendant under rule 25(d) F.R.C.P.

Order granting motion to substitute McGranery for McGrath as party defendant.

Motion for rehearing.

Order denying motion for reconsideration.

Notice of motion and motion for substitution of party defendant.

Affidavit of Salvatore C. J. Fusco in support of motion to substitute party defendant.

Order substituting Brownell, Jr., for McGranery as party defendant.

Supplemental answer.

Order for judgment in favor of defendant.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Cost bond on appeal.

Order extending time to file record on appeal.

Designation of record on appeal.

Reporter's transcript, February 3, 1953.

Reporter's transcript, May 7, 8, 1953.

Plaintiff's exhibits 1, 2, 3, 4, 5, 6, 7, 8.

Government's exhibit A.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 10th day of Aug. 1953.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13970. United States Court of Appeals for the Ninth Circuit. Wong Gong Fay, Appellant, vs. Herbert W. Brownell, Jr., Attorney General of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 12, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 13970

WONG GONG FAY,

Plaintiff,

vs.

HERBERT W. BROWNELL, JR., Attorney General
of the United States, Washington, D. C.,
Defendant.

STATEMENT OF POINTS

Plaintiff sets forth the following points on which he intends to rely on this appeal:

1. The court erred in holding that Wong Gong
2. The court erred in holding that Wong Fay, Fay, the appellant is not the son of Wong Hai.

the appellant, is not a national and citizen of the United States.

3. The court erred in holding that the appellant failed to sustain the burden of proof.

4. The court erred in holding that presumptions in favor of the plaintiff had been dissipated.

5. That the findings, conclusion and judgment of the district court are unsupported and contrary to the evidence of the record.

Respectfully submitted,

/s/ SALVATORE C. J. FUSCO,
Attorney for Appellants.

Service of copy acknowledged.

[Endorsed]: Filed September 3, 1953.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now the appellant by and through his attorney, Salvatore C. J. Fusco, in the above entitled matter, and hereby designates the entire record to be included in the transcript of record on appeal which is necessary for the determination of the points on which he intends to rely on appeal.

Respectfully submitted,

/s/ SALVATORE C. J. FUSCO,
Attorney for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed September 3, 1953.

No. 13,970

United States Court of Appeals
For the Ninth Circuit

WONG GONG FAY,

Appellant,

vs.

HERBERT W. BROWNELL, JR., Attorney

General of the United States,

Appellee.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

SALVATORE C. J. FUSCO,

400 Montgomery Street, San Francisco 4, California,

Attorney for Appellant.

FILED

NOV 16 1953

PAUL P. O'BRIEN

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No. 13,970

**United States Court of Appeals
For the Ninth Circuit**

WONG GONG FAY,

Appellant,

vs.

HERBERT W. BROWNELL, JR., Attorney

General of the United States,

Appellee.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred upon the court below by virtue of Section 503 of the Nationality Act of 1940 (8 U.S.C., sec. 903, 54 Stat. 1171). This appellate court has jurisdiction to review the judgment of the lower court by virtue of Public Law 72, 81st Congress, approved 24 May 1949 (28 U.S.C.A. 1291 and 1292).

STATEMENT OF THE CASE.

The appellant, Wong Gong Fay, a male aged 28 years, claims to be the natural, legitimate, and blood son of his father, Wong Hai, who is a citizen of the United States, and who was a citizen at the time of the birth of said Wong Gong Fay; that by virtue of said circumstances of birth, the appellant herein is vested with all rights and privileges of a citizen of the United States, as provided for by Section 1993 of the Revised Statutes, by descent by and through his father, Wong Hai.

The appellant was issued necessary travel documents by the American Consulate General at Hong Kong, B.C., and arrived in San Francisco, California, on the 22nd day of April, 1951, and applied before the immigration authorities for admission as an American citizen, being the legitimate, blood son of Wong Hai, an American citizen.

After a hearing, the Board of Special Inquiry held that the appellant failed to establish the fact of birth as claimed by the appellant, and therefore was not entitled to admission as a citizen of the United States.

The immigration authorities, upon examination, conceded the citizenship of Wong Hai, appellant's father, as a citizen of the United States.

The decision of the Board of Special Inquiry was appealed to the Commissioner of Immigration and Naturalization and then to the Board of Immigration Appeals. The decision was affirmed and the appel-

lant was ordered excluded and detained for deportation. He was thereafter released on bond, after filing his complaint in the court below, seeking a declaratory relief to establish his paternity and establish recognition of his citizenship.

The case came on regularly for trial and was heard by the court. The father, Wong Hai, was presented as the first witness, and the plaintiff, Wong Gong Fay, as the second witness, for the purpose of establishing the relationship of paternity. The plaintiff introduced certain documents in support of his testimony.

Counsel for the plaintiff did not examine the two witnesses for plaintiff who arrived late, and thereafter the case was submitted.

The defense did not present any witnesses in their behalf and offered no documents other than a document pertaining to the witness Wong Hai. The defendant did not offer any evidence of any nature to controvert the testimony of the plaintiff but simply attempted to impeach the evidence offered by the plaintiff or to weaken the credibility of the appellant's witnesses.

The court found for the defendant, and the appellant by way of appeal seeks to establish the fact of paternity of the appellant, and seeks a consequential declaration of his citizenship as a citizen of the United States.

STATEMENT OF POINTS ON APPEAL.

(1) The court erred in holding that Wong Gong Fay, the appellant, is not the son of Wong Hai.

(2) The court erred in holding that Wong Gong Fay is not a national and citizen of the United States.

(3) The court erred in holding that the appellant failed to sustain the burden of proof.

(4) The court erred in holding that presumption in favor of the plaintiff had been dissipated.

(5) That the findings, conclusions and judgment of the District Court are unsupported and contrary to the evidence of the record.

ARGUMENT.**STATEMENT OF THE EVIDENCE.****Testimony of Wong Hai.**

Wong Hai, as first witness and father of the plaintiff, gave evidence that he, Wong Hai, was born in the City of Yreka, California, on 26 February 1901, and is a citizen and national of the United States, residing in the City and County of San Francisco, State of California, and was issued a form 430 document for the purpose of travelling to China on the 27th day of December, 1924. Wong Hai further testified that he was married to Low Chin Gum on 2 February 1925, and that while Wong Hai was residing in China, two (2) sons were born, the issue of this marriage, and that the first son, Wong Gong Fay, was born on 15 May 1926, and that the second son

was born on 8 May 1927, after Wong Hai, the father, arrived in the United States on 15 December 1926.

Wong Hai identified certain exhibits, namely a landing statement, made upon his return to the United States, and that said document contained statements to the effect that he, Wong Hai, was the father of a son called Wong Gong Fay. Wong Hai further identified certain report cards purporting to be the school records of his son called Wong Gong Fay, and Wong Hai identified a copy of his income tax reports, which claimed an exemption for his sons called Wong Gong Fay and Wong Kai Gong.

The court, upon its own cognizance, observed the similarity of the plaintiff and Wong Hai.

Wong Hai testified that he sent money to his family and to Wong Gong Fay at all times except during the years of World War II.

Testimony of Wong Gong Fay.

Wong Gong Fay gave evidence of his birth by relating that his day of birth was told to him by his mother and that he has a mother who is called Chin Gum. Wong Gong Fay further testified that Wong Hai was his father because he was told so by his mother, and also testified that he has a brother called Kai Gong.

Other matters were testified to, such as money received from Wong Hai, school reports, the city of his dwelling, and a few other questions concerning dates of travel and places of employment.

On cross-examination the counsel for the appellee simply asked many questions concerning dates, places of travel and employment, and failed to impeach the witness Wong Gong Fay on any matter of relationship or materiality; in fact there were no discrepancies in the testimony given by Wong Gong Fay.

- (1) THE COURT ERRED IN HOLDING THAT WONG GONG FAY, THE APPELLANT, IS NOT THE SON OF WONG HAI.
- (2) THE COURT ERRED IN HOLDING THAT WONG GONG FAY IS NOT A NATIONAL AND CITIZEN OF THE UNITED STATES.

The gravamen of this action is one of paternity with the resulting privilege of citizenship as a consequence thereof, and further, the instant action should not suffer the label, "Chinese Immigration Case," nor be categorized in any caste of actions other than a purely civil action at law. This action should be tried and heard under the ordinary rules of trial procedure and laws of evidence which are applicable to all parties who may come within the jurisdiction of the United States Federal Courts within the State of California, and that the plaintiff in the instant case should not be subjected to artificial rules of sustaining the burden of proof, nor should the defendant enjoy a relaxation of the burden of giving evidence.

Rule 43A of the *Federal Rules of Procedure* provides:

"All evidence shall be admitted which is admissible under the Statutes of the United States

or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held.”

(3) THE COURT ERRED IN HOLDING THAT THE APPELLANT FAILED TO SUSTAIN THE BURDEN OF PROOF.

The appellant and his witness gave evidence and testimony and were required to sustain the burden of proof inasmuch as the affirmative issue was upon the appellant herein and to this extent were bound by the California Code of Civil Procedure.

California Code of Civil Procedure provides in Sec. 2061, ‘Effect of Evidence’:

“(5). That in civil cases the affirmative must be proved and when the evidence is contradictory, the decision must be made according to the preponderance of evidence.”

The court held in *Valencia v. Milliken*, 31 C.A. 533:

“In civil cases a preponderance of evidence is all that is required.”

Again it is contended by the appellant that the testimony of the witnesses produced by the appellant sustained the preponderance of evidence.

The question of “preponderance of evidence and the significance thereof” was settled by the court in *Mather v. Aggeler & Musser*, 179 C. 697:

“By a preponderance of evidence is meant such evidence as when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.”

In the instant action the appellee failed to produce any evidence of any nature, nor did the appellee produce one single witness in his own behalf, nor exhibits, except those inherent to the files of the appellant, which was in support of appellant's testimony.

The only semblance of any evidence produced in behalf of his own defense was a well-worn map of China from which geographical problems were proposed to the appellant's witness.

The court held in *De Laval Dairy Supply v. Steadman*, 6 C.A. 659, 92 P. 877:

“The defendant must establish his new matter by a preponderance of evidence.”

The transcript clearly reveals that no preponderance of evidence was given on behalf of the defendant.

The court held in *Wheeler v. Fidelity & Dep. of Maryland*, 63 F. 2d 562:

“Defendant has burden to establish affirmative defense by preponderance of evidence.”

The appellant produced several witnesses in his behalf, but only Wong Hai gave evidence, the other two (2) witnesses, having been present at all times and ready to testify, arrived at a late hour, to give

their testimony, and counsel for the appellant thereupon submitted.

California Code of Civil Procedure, Sec. 1844, provides:

“The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact except perjury and treason.”

This was the ruling of the court in *Southern California Music Co. v. Lake*, 106 C.A. 255 also.

Here the testimony of Wong Hai was neither impeached, controverted nor discredited, although counsel for appellee made strong but unsuccessful attempts to discredit the testimony of Wong Hai.

The court took a strong view of this principle where it held in *Myles v. Russell*, 190 C. 485:

“The testimony of one witness who is entitled to credit is sufficient for the proof of any fact in a civil case, even though that testimony be uncorroborated and contradicted by the testimony of any number of other witnesses.”

It is to be noted that Wong Hai gave evidence, and this evidence should be considered not alone in respect to its credibility and the quantum thereof, but should be considered with the evidence given by the appellee, which, of course, was none. Again the rules of evidence are clear on this point.

California Code of Civil Procedure, Sec. 2061, provides in “Effect of Evidence”:

“(6) That evidence is to be estimated not only by its own intrinsic weight but also according

to the evidence which it is in the power of one side to produce and of the other to contradict.”

The court held in *Thompson Lumber v. Inter. Comm. Comm.*, 193 F. 682:

“In a civil action complainant is not bound to do more than sustain his case by a preponderance of the credible testimony.”

(4) THE COURT ERRED IN HOLDING THAT PRESUMPTION IN FAVOR OF THE PLAINTIFF HAD BEEN DISSIPATED.

We have now a position wherein a witness under oath makes a statement to the effect that a specific child is his legitimate and natural offspring. Wong Hai under oath stated that the appellant, Wong Gong Fay, was the legitimate and natural offspring, the issue of the marriage between Wong Hai and Low Chin Gum, his wife.

The California Code provides a presumption which is disputable in favor of the person having the affirmative burden of proof, where there is a question involving paternity of a child. Therefore, Wong Hai, having given evidence of the birth of his child, and having given testimony that Wong Gong Fay was his child, was entitled to rely upon the statute establishing a presumption of legitimacy of the paternal relationship between himself and his son, Wong Gong Fay, as provided by *California Code of Civil Procedure*, Sec. 1963:

“Disputable Presumptions: All other presumptions are satisfactory if uncontradicted. They are

denominated disputable presumptions and may be controverted by other evidence. The following are of that kind:

Subd. (31).

“That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate.”

This was followed by the court in *Estate of Romero*, 75 C. 379:

“Children born to a married woman during her coverture are presumed to be legitimate and to be the issue of their mother and her husband.”

A presumption follows the proceeding until dissipated by the evidence produced at the hearing, and must be overcome by the party taking the negative issue.

The appellee failed to introduce or produce any evidence or testimony to overcome the presumption allowed the appellant as to the legitimacy of the offspring, Wong Gong Fay, being the legitimate son of Wong Hai.

In the *Estate of Walker*, 180 C. 478, it was held:

“An instruction that the presumption of legitimacy can be overcome only by clear and satisfactory proof is a correct statement of the law.* * *”

Wong Gong Fay bears the family name of Wong, the father's name being Wong Hai.

Again in *California Code of Civil Procedure*, Sec. 1963, subd. (25), ‘Identity of person from identity of name’, we have a presumption which the appellee

failed to dissipate, and was carried through the trial in favor of the appellant, that the appellant, Wong Gong Fay, had the same name as his father, Wong Hai, and was to be considered as assisting in establishing the question of parentage.

The court followed this reasoning in *Re Woolsey's Estate*, 128 Cal. App. 391; *McKinley Bros. v. McCanby*, 215 Cal. 229:

“It has been held that where the names were practically similar the presumption of identity was sufficient, there being no rebuttal.”

Thus far the appellant has proceeded with the burden of proof and maintained the presumption and thereby has set upon the scale a quantum of evidence that has availed the appellant of the preponderance of evidence. The general rule is stated in 32 *C.L.R.* 242 and 32 *C.J.S.* 1047:

“In ordinary civil actions a fact sufficiently proved by a preponderance of evidence, and the verdict or finding should be based on such preponderance, the requirement of a higher degree of proof being improper.”

“A bare preponderance however slight is commonly regarded as sufficient.”

The transcript reveals that the appellee has failed to introduce evidence, or to overcome or to place in equipoise the appellant's preponderance of evidence.

The rule was stated in *Stone v. Stone*, 136 F. 2d 761:

“Neither a jury nor a judge is at liberty to disregard positive testimony uncontradicted and not inherently improbable.”

The court refused to accept the testimony of Wong Gong Fay and Wong Hai, which was positive, unimpeached and uncontroverted by the appellee. The court on the contrary made its findings which were based on speculation or personal belief. The testimony of Wong Hai and Wong Gong Fay was not contradicted, as revealed by the transcript. Therefore, the court should have accepted their testimony.

The court held in *National Labor Relations Board v. Ray Smith Trans. Co.*, 193 F. 2d 142:

“Where a witness’s testimony is not contradicted, a trier of fact has no right to refuse to accept it.”

However, the finding of the court was contrary to the evidence given by the appellant.

Again this rule was enunciated in *Controller of Cal. v. Lockwood*, 193 F. 2d 169:

“Courts may not find facts from speculation, no matter how difficult or impossible it may be to produce evidence establishing the facts in dispute.”

CONCLUSION.

The appellant therefore submits that the record substantially discloses that Wong Gong Fay is the legitimate and natural son of Wong Hai, and as such is a national and a citizen of the United States, and is consequently entitled to a judgment determining the status of Wong Gong Fay as an American citizen.

The judgment of the trial court should, therefore, be reversed.

Dated, San Francisco, California,
November 9, 1953.

Respectfully submitted,

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Attorney for Appellant.

No. 13,970

United States Court of Appeals
For the Ninth Circuit

WONG GONG FAY,

Appellant,

vs.

HERBERT W. BROWNELL, JR., Attorney
General of the United States,

Appellee.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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PAUL P. O'BRIEN
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United States Court of Appeals

For the Ninth Circuit

WONG GONG FAY,

Appellant,

vs.

HERBERT W. BROWNELL, JR., Attorney

General of the United States,

Appellee.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The appellant herein claims to be the son of Wong Hie, alleged to be a citizen of the United States at the time of his birth in China. Paragraphs II, III, and IV of the complaint allege:

II. That plaintiff has been, and at all times herein stated, is still being held in restraint and being denied his liberty by the defendant in that the plaintiff is confined to the Immigration Detention Quarters at San Francisco, California, and further that the defendant has ordered the plaintiff to be deported from the United States as an alien.

III. That plaintiff's father, Wong Hie, is a citizen and national of the United States and is now a resident of the City and County of San Francisco, California, and further that the plaintiff was born on May 15, 1926, in Toyshan, Kwangtung, China, and that the plaintiff herein is the natural and legitimate son of the above-named Wong Hie and further that the plaintiff is a citizen and national of the United States by virtue of the provisions of Revised Statutes 1993, as amended, and further that the plaintiff is a resident of the City and County of San Francisco, California.

IV. That plaintiff claims a right and privilege as a national and citizen of the United States and further claims the attending rights and privileges to enter and remain in the United States and to enjoy all pertinent rights and privileges therein, and further that plaintiff alleges that defendant herein named has denied and still continues to deny said rights and privileges to the plaintiff and that the executory officials of the Department of said defendant have denied and continue to deny the plaintiff such rights and privileges as a national and citizen upon the grounds that the plaintiff herein named is not a national and citizen of the United States.

The answer denies the claimed relationship to Wong Hie and denies that the appellant is a citizen of the United States.

After appellant's arrival at the port of San Francisco, he was afforded an administrative hearing, during which he was represented by counsel. His request

for admission into the United States was denied, and after filing an action under 8 U.S.C. 903, trial was had. Following the trial, the court below found as a fact:

Findings of Fact: That the person who calls himself Wong Gong Fay and who claims to be the son of Wong Hie has failed to introduce evidence of sufficient clarity to satisfy or convince this court that Wong Hie is the natural blood father of the person, Wong Gong Fay, or that he was born at the time and place claimed, or that the person who appeared before this court claiming to be Wong Gong Fay is in truth and in fact Wong Gong Fay.

Conclusions of Law: The person appearing before this court as plaintiff in this action is not entitled to the relief prayed for in the petition.

From the judgment denying the relief sought, the above appeal was taken.

JURISDICTION.

Appellee does not concede that the District Court had jurisdiction over the appellant's claim under 8 U.S.C. 903. On the jurisdictional question appellee relies on the argument of the Government and the briefs heretofore or hereafter submitted in the cases of *Chow Sing v. Brownell*, No. 13,746, and *Lee Mon Hong v. Brownell*, No. 13,957, now pending before this Court. The jurisdictional issue is identical and appellee contends that the final decision as to jurisdiction in the *Chow Sing* and *Lee Mon Hong* cases should

be determinative of the jurisdictional issue in this case.

STATUTES.

Sec. 503 of the Nationality Act of 1940, 54 Stat. 1171, Title 8 U.S.C. 903.

Sec. 1993 Revised Statutes, as amended by the Act of May 24, 1934, 48 Stat. 797, Title 8 U.S.C. 6.

§ 903. Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges as national; certificate of identity pending judgment.

If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which

he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I, Subchap. V, § 503, 54 Stat. 1171.

Sec. 1993, Revised Statutes.

All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States, but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

Act of May 24, 1934—48 Stat. 797.

Citizenship of Children Born Abroad of Citizen Fathers (Acts of April 14, 1802, and February 10, 1855, as amended by Act of May 24, 1934).

Sec. 1993. Any child hereafter born out of the limits and jurisdiction of the United States,

whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization. (Sec. 1, Act of May 24, 1934, 48 Stat. 797; 8 U.S.C. 6.)

QUESTIONS PRESENTED.

Appellant specifies the following points in his appeal:

(1) The court erred in holding that Wong Gong Fay, the appellant, is not the son of Wong Hai.

(2) The court erred in holding that Wong Gong Fay is not a national and citizen of the United States.

(3) The court erred in holding that the appellant failed to sustain the burden of proof.

(4) The court erred in holding that presumption in favor of the plaintiff had been dissipated.

(5) That the findings, conclusions and judgment of the District Court are unsupported and contrary to the evidence of record.

From appellant's brief it may be seen that all of the specified points are embodied in a single issue: Is the appellant the son of a recognized United States citizen?

ARGUMENT.

I. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT ARE CORRECT.

The appellant states, "The gravamen of this action is one of paternity, with the resulting privilege of citizenship as a consequence thereof . . ." Inherent in the question of relationship or paternity is the matter of identity. Who is the person who claims to be the son of a citizen father? The assertion by a United States citizen of the Chinese race upon return from a visit to China that he had married a Chinese woman and that a son was born in China establishes the basis for a Chinese person at a later date to claim to be that son. Whether or not such a birth occurred is not subject to disproof—only proof can be required. Whether or not the person who makes the claim is that son is likewise only subject to the presentation of adequate proof.

The proposition sought to be sustained in this, as in many other similar cases, is: *The assertion under oath in the District Court by the claimant and the*

alleged parent that they are parent and child establishes a preponderance of the evidence sufficient to sustain the burden of proof and the defense must move forward to disprove the claim. In immigration proceedings this contention has been extremely successful. The small number of cases that have been brought to the court by way of habeas corpus well testifies to this success. The record in none of these cases, however, discloses the number of claimants who have been admitted to the United States as nationals upon proof, or rather absence of proof, that would arouse a true citizen to alarm. Many of the judges have become aware of the aura of fraud that surrounds these claims.

- (1) Judge Hanford in *Gee Fook Sing v. U. S.*, 49 F. 146;
- (2) Judge Hawley in *Lee Sing Far v. U. S.*, 94 F. 834;
- (3) Justice Holmes in *U. S. v. Sing Tuck*, 194 U.S. 161;
- (4) Justice Field in *The Chinese Exclusion Case*, 130 U.S. 581;
- (5) Judge Bourquin in *Ex parte Jew You On*, 16 F. 2d 153;
- (6) Judge Rudkin in *Lee Sai Ying v. U. S.*, 29 F. 2d 108;
- (7) Judge Lemmon in *Fong Ging Hung v. Acheson*, (unreported), Civil Docket No. 6599;

(8) Judge Goodman in *Ly Shew v. Acheson*, 110 F. Supp. 50;

(9) Judge Westover in *Mar Gong v. McGranery*, 109 F. Supp. 821.

Certainly we cannot disagree with Judge Goodman that "We do not pass it (American citizenship) out on a platter." (*Ly Shew v. Acheson*, *supra*.)

In *Go Lun v. Nagle*, 22 F. 2d 246; *Gung You v. Nagle*, 34 F. 2d 848; and *Quan Toon Jung v. Bonham*, 119 F. 2d 915, and any number of other cases, this Court reviewed the proceedings of the Immigration Service on an appeal from a denial of the application for the writ of habeas corpus in the District Court.

Quon Quon Poy v. Johnson, 273 U.S. 352, is the controlling Supreme Court decision.

In each of these cases a Chinese, fresh from China, who had spent all of his life in China, who had never been in the United States, says, "I am a citizen of the United States because I am the son of Wing Doe, who is a citizen." Considering the "inestimable heritage of citizenship" which Justice Fuller in *Chin Bak Kan v. U.S.*, 186 U.S. 193, says "is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show it was ever possessed", what proof must be produced to justify any official or judge to say this man is a national or citizen of the United States? By some undisclosed process the Immigration Service was led into the position of assuming the burden to disprove the claim, and to thereby embark on an ex-

tensive interrogation of the witnesses having as its purpose the production of discrepancies. That all of the persons appearing as witnesses were "well coached" was well known to Immigration. The interception of numerous "transcripts" of the testimony to be memorized by each witness had conclusively established this fact. The attitude of mind of the examiner was obviously influenced by this knowledge and his purpose was to disclose discrepancies by breaking through the "story."

The objective is to probe an area where there may have been no preparation. The process is obviously tortuous, prolonged and seemingly exceedingly irrelevant as to the testimony adduced. Our question is still what proof is to be produced by the claimant?

Judge Bourquin was very clear on the question in *Ex parte Jew You On*, 16 F. 2d 153, 154 (1926), when he said:

It is argued that, if the bare oath of two or three Chinese or other persons is not accepted, Chinese American citizens procreated in China will be barred from this country of their father's nativity. The answer is the responsibility is not the immigration officers' nor the court's. Like any case, the burden is the proponent's to prove it. Perhaps not unfamiliar registry systems might be adopted. Otherwise, this country is helpless, the exclusion policy futile, and the Chinese admitted will be limited solely by the extent there is courage to take advantage of opportunity.

Judge Garrecht in *Mui Sam Hun v. U.S.*, 78 F. 2d 612, 615, stated:

The rule is not, as appellant contends that the applicant need only make out his case by a fair preponderance of the evidence, for it is not incumbent upon the government to offer any evidence whatsoever. Rather, the burden is upon the applicant to prove his right to admission and the Board is the sole judge of credibility of the witnesses, and its finding will not be disturbed without a showing that the hearing was unfair and unreasonable, or that the finding was arbitrary or capricious. The weight of the evidence and the credibility of witnesses is not for us, but for the Board.

With the above in mind let us turn to Judge Healy's opinion in *Quan Toon Jung v. Bonham*, supra, p. 919:

Aside from the single item of the 1924 landing certificate, the showing of paternity was persuasive. On the occasion of Quan Siew's various other landings and departures the information given by him concerning the appellant and his other children squares with the present testimony. There were slight discrepancies, of course, as in the phonetic spelling of names, but these were not significant, and are readily explainable. *The testimony of the applicant and of the alleged father in support of the relationship is of such character as to compel belief.* On the great mass of intimate details testified to their accounts are confessedly in substantial agreement. There is no evidence of coaching, as the board of review concedes; and indeed coaching sufficient to produce the results obtained here would have been virtually impossible. Quan Siew and the boy had not seen each other in seven years and at the

time of the inquiry they were separated by a distance of a thousand miles. If it were permissible to judge from their photographs it would be seen that the two so closely resemble each other as to further substantiate the belief that they are father and son. (Emphasis ours.)

The evidence submitted was in the familiar pattern—"I am the son"—"I am the father," followed by the belated attempt of the examiner by extensive interrogation to uncover a discrepancy.

Judge Bourquin's remarks at page 154 of *Ex parte Jew You On* are illuminating:

In endeavor to avoid the usurpation (judicial invasion of executive domain), the immigration authorities have invented a more or less absurd rule of "discrepancies." That is by examination of immigrant and witnesses to develop contradictions, often collateral and trivial in character, and by reason of these to justify that which needs none—their disbelief of the immigrant's witnesses before them.

But to return to *Quan Toon Jung*, Judge Healy says the photographs of Leong Sing and Quan Siew are slender evidence of identity and that the Bureau at Washington was right in rejecting it. But says the judge, the examination of the photograph of Quon Siew and the boy affords further substantiation for the belief that they are father and son.

Judge Healy says there is substantial agreement on the great mass of intimate details testified to in their accounts.

Judge Roche in *Lee Mon Hong v. Brownell*, (affirmed by this Court) No. 13,957, has said "Had he (the plaintiff) been letter perfect in his answers to all the examiner's questions the Court might be more inclined to believe him an imposter reciting memorized material."

Judge Goodman in *Ly Shew v. Dulles*, *supra*, has specifically stated his trouble:

The testimony at the trial, which lasted three days, was entirely given in the Toy Shan Chinese dialect and interpreted into English. Neither Ly Shew, the alleged father, nor the plaintiffs, nor the witnesses in behalf of plaintiff, could speak a word of English.

Many times the interpreter carried on extensive dialogues with the witness before obtaining a response to a question propounded. Inconsistencies and contradictions in testimony became manifest. To fairly determine their effect is difficult if not impossible. Familiar as we are in this court with Chinese interpreted testimony, it can be categorically stated that it is well-nigh impossible to determine the credibility of such witnesses, at least after ten years of constant trial work, I find it so.

Judge Healy, in *Quan Toon Jung*, had no difficulty in reading a cold record, with no interpreter problem, and in reaching the conclusion that "the testimony of the applicant and of the alleged father in support of the relationship is of such character as to compel belief." It appears to us that the case had a strong

aroma of fraud. Immigration and the Court below had had no trouble detecting it.

Appellant submits that he has sustained the burden of proof by the preponderance of evidence and that since appellee presented no evidence, judgment should be for appellant.

This court in *Wong Kam Chong v. United States*, 111 F. 2d 707, 712, discussed the question of burden of proof and stated:

Burden of proof in one sense means the duty to establish a certain fact by a certain degree of proof, such as a preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt. In another sense it means the duty to offer evidence or the duty to go forward with the evidence.

Where, as here, the evidence is solely within the possession of the appellant, the reasoning of counsel for appellant begs the question as to the duty of going forward and what constitutes a *prima facie* case in this sort of proceeding. Whether or not the showing made is *prima facie* depends upon the nature and extent of the burden of proof.

The courts of the United States have recognized the great difficulty confronting them as well as the Immigration Service in cases involving claims to United States citizenship.

In *Chin Bak Kan v. United States*, 186 U.S. 193 (1902) the Supreme Court stated:

The facts on which such a claim (assertion of citizenship) is rested must be made to appear. And

the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves under pressure of a particular exigency, without being able to show that it was ever possessed. (Words in parentheses ours.)

This court in *Lee Sing Far v. United States*, 94 Fed. 834 (C.A. 9) recognizing the problem stated at page 837:

It is safe to say that the United States is powerless to make any proof in any case as to the place of birth of Chinese children. In the very nature of the case it would as a general rule be impossible to do so.

II. THE EVIDENCE.

The only witnesses presented by appellant in the court below were the appellant and the alleged father, Wong Hie. Wong Hie testified that he had resided in the United States for his entire life with the exception of two years, during which period he visited China. Yet he testified in the Chinese language through an interpreter (TR 30 to 82).

Wong Hie testified that he was born in Yreka, California, Feb. 28, 1901; that he resided in the United States until 1924, at which time he visited China for a short period. He testified that he was married in 1925 in China; that he had two children born in 1926 and 1927; and that he returned to the United States in 1926 prior to the birth of the second child. Wong Hie was unable to testify as to the present whereabouts of relatives, and seemed vague

and uncertain regarding schooling and other facts of his own childhood. By his own testimony he had not seen Wong Gong Fay from the time of his departure from China in 1926 until the appellant, who represents himself to be Wong Fong Fay, arrived in the United States in 1951. Wong Gong Fay testified that he was born in China; that he saw his father after his birth, but "I was too young to know, but I saw him when I came to the United States." In addition to the testimony of the appellant and his alleged father, Wong Hie, there were offered into evidence the statement of Wong Hie on arrival in the United States that he had married in China and had a son, Wong Gong Fay, and a number of school records and tax returns. There were no other witnesses.

This is another example of the Chinese claim of citizenship based solely upon the allegation of the appellant and the alleged father, with no evidence whatever to establish the identity of the appellant. He concedes that he had never seen Wong Hie prior to his arrival in the United States, and Wong Hie concedes that he has not seen his son since infancy. Does such testimony establish the identity of the appellant as the son of Wong Hie? The transcript indicates that there were other witnesses available but were not called (TR 100).

CONCLUSION.

Appellant concludes his brief with the statement:
The appellant therefore submits that the record substantially discloses that Wong Gong Fay is

the legitimate and natural son of Wong Hie, and as such is a national and a citizen of the United States, and is consequently entitled to a judgment determining the status of Wong Gong Fay as an American citizen.

Appellee has hereinabove set forth the proposition which appellant seeks to sustain in this case and which counsel seek to make applicable to all derivative 903 cases. *The assertion under oath in the District Court by the claimant and the alleged parent that they are parent and child establishes a preponderance of the evidence sufficient to sustain the burden of proof and the defense must move forward to disprove the claim.*

The evidence herein amounts to nothing more than an assertion by the claimant and the alleged father. It is submitted that the judgment of the court below should be affirmed.

Dated, San Francisco, California,
September 1, 1954.

Respectfully submitted,

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

Attorneys for Appellee.

MILTON T. SIMMONS,

Acting District Counsel,

Immigration and Naturalization Service,

San Francisco, California,

On the Brief.

No. 13,970

United States Court of Appeals
For the Ninth Circuit

WONG GONG FAY,

Appellant,

vs.

HERBERT W. BROWNELL, JR., Attorney
General of the United States,

Appellee.

Appeal from the United States District Court for the
Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

SALVATORE C. J. FUSCO,
400 Montgomery Street, San Francisco 4, California.
Attorney for Appellant.

FILED

OCT 15 1954

PAUL P. O'BRIEN
CLERK

No. 13,970

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WONG GONG FAY,

Appellant,

VS.

HERBERT W. BROWNELL, JR., Attorney

General of the United States,

Appellee.

**Appeal from the United States District Court for the
Northern District of California, Southern Division.**

APPELLANT'S REPLY BRIEF.

The appellee in his brief raised the question of jurisdiction (p. 3) by contending that the District Court does not have jurisdiction under 8 U.S.C. 903, and the appellee relies on his arguments and briefs submitted by the Government in the cases of *Lee Mon Hong v. Brownell*, No. 13,957.

The decision in the above case has already been delivered by the court and the question of jurisdiction has been decided.

The question was again raised in the *Ly Shew v. Dulles* case, No. 13,808, with respect to want of jurisdiction under 8 U.S.C. 903, and the court held that there was jurisdiction, citing *Brownell v. Lee Mon Hong*, No. 13,957, and *Fone Wong Jing v. Dulles*, No. 13,745.

CONCLUSION.

The appellee has reiterated in his conclusion the statement of the appellant: That the record discloses the fact of paternity of Wong Gong Fay as the son of Wong Hie.

The appellee in his presentation of argument and his case, insists that the court should summarily disbelieve the testimony of the witnesses as evidenced by the record.

Again the appellant stands upon the premises and grounds raised in his opening brief, which have not been controverted by the appellee.

Dated, San Francisco, California,
October 15, 1954.

SALVATORE C. J. FUSCO,
Attorney for Appellant.

No. 14110

United States
Court of Appeals
for the Ninth Circuit

A. L. KAYE,

Appellant,

vs.

BANK OF FAIRBANKS, a Banking Corporation,
Appellee.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Fourth Division

FILED

JAN 19 1954

PAUL P. O'BRIEN
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Attorney for Plaintiff and Appellant.

MAURICE T. JOHNSON,

Box 1511, Fairbanks, Alaska,

Attorney for Defendant and Appellee.

In the District Court for the District of Alaska,
Fourth Division

No. 7309

A. L. KAYE,

Plaintiff,

vs.

BANK OF FAIRBANKS, a Banking Corporation,
Defendant.

COMPLAINT

Comes Now the plaintiff above named and for cause of action against the above-named defendant, complains and alleges:

I.

That at all the times and places herein mentioned, the above-named defendant was and is now a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, and engaged in the general banking business in Fairbanks, Alaska.

II.

That on the 23rd day of October, 1952, the above-named plaintiff had on deposit with the said defendant the sum of Fourteen Hundred Eighty Dollars (\$1480.00), in a special checking account, and the said money was the property of the plaintiff.

III.

That on the 23rd day of October, 1952, the said Defendant wrongfully and wilfully converted and

disposed of said sum of \$1480.00 to its own use, and unlawfully refused to allow the said Plaintiff to withdraw said money from said Bank to the damage of Plaintiff in the sum of Fourteen Hundred Eighty Dollars (\$1480.00).

Wherefore, Plaintiff demands judgment against Defendant in the sum of Fourteen Hundred Eighty Dollars (\$1480.00), together with interest thereon at the rate of 6% per annum from [1*] the 23rd day of October, 1952, together with the costs and disbursements herein and a reasonable sum to be allowed Plaintiff by the Court as an Attorney's fee.

/s/ JULIEN A. HUSLEY,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed November 7, 1952. [2]

[Title of District Court and Cause]

ANSWER

Now Comes the above-named Defendant, Bank of Fairbanks, a Banking Corporation, and for answer to the Complaint of the Plaintiff, admits, denies and alleges as follows:

I.

The Defendant admits the allegations contained in Paragraphs I and II of the Complaint.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

II.

The Defendant denies the allegations contained in Paragraph III of said Complaint; and

For a First Affirmative Defense, the Defendant alleges as follows:

I.

The Defendant moves to dismiss the above-entitled cause on the ground and for the reason that the Complaint does not state facts sufficient upon which to base a claim against the Defendant; and

For a Second Affirmative Defense, the Defendant alleges as follows:

I.

The Defendant alleges that the funds deposited in the bank of the Defendant by the Plaintiff were the property of the Plaintiff, and that said funds were deposited without instructions, [3] and were not a special fund, and that at the time of said deposit the Plaintiff was indebted to the Bank of Fairbanks in a sum far in excess of said deposit, and that the said indebtedness was due and owing at that time by the Plaintiff to the Defendant bank, and that therefore the Defendant applied the said funds on deposit in the name of the Plaintiff as part payment of the indebtedness then due and owing by the Plaintiff to the Defendant bank.

Wherefore, the Defendant prays that the Plaintiff take nothing by his Complaint and that the Defendant be hence dismissed with its costs and reasonable attorney's fee.

BANK OF FAIRBANKS,
Defendant,

By /s/ R. C. BAILEY,
Vice-President.

Duly verified.

Service of Copy acknowledged.

[Endorsed]: Filed May 5, 1953. [4]

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 7309

A. L. KAYE,

Plaintiff,

vs.

BANK OF FAIRBANKS, a Banking Corporation,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: Hon. Harry E. Pratt, District Judge.

Appearances :

GEORGE B. McNABB,

Of Fairbanks, Alaska,

Attorney for Plaintiff.

MAURICE T. JOHNSON,

Of Fairbanks, Alaska,

Attorney for Defendant.

Date: October 8, 1953.

Place: Fairbanks, Alaska.

Be It Remembered, that upon the 8th day of October, 1953, the trial was had in cause No. 7309, plaintiff and defendant represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: This is the time set for trial in the case of Kaye vs. Bank of Fairbanks.

Are counsel ready to proceed?

Mr. McNabb: The plaintiff is ready, your Honor.

Mr. Johnson: The defendant is ready.

The Court: Very well, we will start.

Mr. McNabb: As the plaintiff's first witness, your Honor, I would like to call Mr. Bailey.

RALPH BAILEY

a witness called in behalf of the plaintiff, was sworn and testified as follows:

Direct Examination

By Mr. McNabb:

Q. Will you state your name, please?

A. Ralph C. Bailey.

Q. Where do you reside, Mr. Bailey?

A. 1325-6th.

Q. In what city? A. Fairbanks, Alaska.

Q. By whom are you employed, sir?

A. Bank of Fairbanks. [3*]

Q. What is your capacity with that bank?

A. Vice president.

Q. How long have you been employed by the Bank of Fairbanks? A. Seven years.

Q. Has that employment been continuous?

A. It has.

Q. How long have you been the vice-president of the bank? A. Three and one-half years.

Q. You were made vice-president in the year 1950, is that correct, or 1949?

A. Either 1949 or 1950, I don't recall exactly.

Q. Are you acquainted with Mr. A. L. Kaye, the plaintiff in this action? A. I am.

Q. How long have you known Mr. Kaye?

A. Seven years.

Q. Does Mr. Kaye have an account in your bank? A. He does.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Ralph Bailey.)

Q. Do you know how long he has maintained an account in your bank? A. Not definitely.

Q. Did he have an account in your bank in the year of 1952? [4] A. He did.

Mr. McNabb: Will you mark this for identification, please?

Clerk of Court: Plaintiff's Identification No. 1.

(The notification to plaintiff of debits to his bank account, dated October 23, 1952, was marked Plaintiff's Identification No. 1.)

Q. (By Mr. McNabb): Mr. Bailey, I show you Plaintiff's Identification No. 1 and ask you if that is a copy of your signature affixed thereto?

A. It is.

Q. What is that slip, sir, Plaintiff's Identification No. 1, if you know?

A. It is a debit against the man's account.

Q. Against whose account?

A. A. L. Kaye, special account.

Q. And in what bank?

A. Bank of Fairbanks.

Q. When was that debit made, Mr. Bailey?

A. This is dated October 23, 1952, but our records indicate that it cleared the bank October 24, 1952. [5]

Q. The day following? A. That is right.

Q. When you say this is a debit, was that a charge against Mr. Kaye's account?

A. That was a charge against Mr. Kaye's account.

(Testimony of Ralph Bailey.)

Q. And the bank withdrew some money, that is, \$1,480, as shown here, from Mr. Kaye's account?

A. That is correct.

Q. For what purpose was that withdrawn, Mr. Bailey?

A. For funds due and owing us, and also past due.

Q. Will you read, please, the items which constitute that charge?

Mr. Johnson: If the Court please, it seems to me that the document would speak for itself, if he wants to offer it in evidence.

The Court: Yes, I will take a look at it myself.

Mr. McNabb: I move that Plaintiff's Identification No. 1 be admitted in evidence, your Honor.

Clerk of Court: Plaintiff's Exhibit A.

(Notification to plaintiff of debits to his bank account was received in evidence as Plaintiff's Exhibit A.)

PLAINTIFF'S EXHIBIT A

We Have This Day Charged Your Account as
Follows:

Fairbanks, Alaska, October 23, 1952.

	Amount
Paid Clerk of Court.....	21.00
Paid United States Marshal.....	9.00
Paid Retainer Maurice Johnson atty at law.	250.00

(Testimony of Ralph Bailey.)

Paid Balance of Retainer Maurice Johnson

atty at law1,200.00

Total1,480.00

To A. L. Kaye—Special Account

Box 550

City

By /s/ R. C. BAILEY,

Vice President.

Bank of Fairbanks 59-20

Received in evidence October 8, 1953.

Q. (By Mr. McNabb): Mr. Bailey, Plaintiff's Exhibit A shows that a notation was made of "Paid Clerk of Court \$21.00." Do you know [5-A] what that charge was for? A. Yes.

Q. What was it for?

A. It was given to our attorney to file a case against A. L. Kaye.

Q. Given to whose attorney?

A. Our attorney.

Q. Who was that?

A. Maurice T. Johnson.

Q. The second item on Plaintiff's Exhibit A, "Paid United States Marshal, \$9.00."

A. Given to our attorney for payment to the United States Marshal to serve papers.

Q. When you say "our," who do you mean?

(Testimony of Ralph Bailey.)

A. The Bank of Fairbanks, our attorney.

Q. The Bank of Fairbanks' attorney?

A. That is right.

Q. The third item, "Paid Retainer Maurice Johnson atty at law \$250.00"?

A. That is correct.

Q. What was that charge for?

A. We retained attorney Johnson as our attorney, and that was a retainer in this particular case.

Q. In what case?

A. Bank of Fairbanks vs. A. L. Kaye. [6]

Q. The fourth item——

The Court: What was this case? What was the number of it?

Mr. McNabb: 7114.

Mr. Johnson: That case is pending before this Court, your Honor.

Mr. McNabb: May I see that file, please, Judge?

Q. (By Mr. McNabb): Mr. Bailey, I will show you the file in Cause No. 7114, which is the case of the Bank of Fairbanks, an Alaska corporation, plaintiff, against A. L. Kaye, Jean Kaye and Josephine Boussard. Do you know whether this is the case for which the charge was made, as is evidenced by Plaintiff's Exhibit A?

A. No, I do not know definitely. I leave that up to my attorney, but it appears to be on the surface.

Q. Mr. Bailey, is there any other case pending, to your knowledge, in which the Bank of Fairbanks has sued A. L. Kaye? A. No.

(Testimony of Ralph Bailey.)

Q. Was there such a case on October 23 or 24 of 1952?

A. Yes.

Q. There was another case?

A. No other cases. This is the only case.

Q. That is it, then?

A. That is correct. [7]

Q. The fourth item on Plaintiff's Exhibit A is "Paid Balance of Retainer Maurice Johnson atty at law \$1,200.00." What was that?

A. That was attorney's fees.

Q. For what?

A. For his services rendered to that date. You understand the suit started back in April, 1952.

Q. Now, then, you say the suit. What suit do you mean, Mr. Bailey?

A. Bank of Fairbanks, plaintiff, against a foreclosure on the piece of property—A. L. Kaye, defendant.

Q. Did Mr. Kaye employ Mr. Johnson to represent him on that case?

A. Not to my knowledge.

Q. He was the bank's attorney in that case?

A. That is correct.

Q. Why did you charge Mr. Kaye's account for your attorney?

A. Because it was due and owing.

Q. What was due and owing?

A. The \$1,480.

Q. Mr. Bailey, had that case reached a judgment at that time, on the 23rd of October or the 24th of October?

(Testimony of Ralph Bailey.)

A. No, it hadn't, not to my knowledge.

Q. Has it yet? [8]

A. Not to my knowledge.

Q. Did Mr. Kaye agree to pay Mr. Johnson?

A. Not to my knowledge. However, our records indicate that we are allowed to do——

Q. I say, though, did Mr. Kaye agree with you to pay Mr. Johnson's fee? A. No.

Q. Do you have any evidence in writing that he did? A. No.

Q. I beg your pardon? A. No.

Q. He didn't employ Mr. Johnson to represent him that you know of?

A. Not to my knowledge.

Q. There is, to your knowledge, no other action which was pending between Mr. Kaye and the bank?

A. No.

Q. And this is the charge that was made for the file which I showed you? A. That is correct.

Q. And the bank had employed Mr. Johnson?

A. We had.

Q. And Mr. Kaye hadn't?

A. Not to my knowledge.

Q. What did Mr. Kaye get for his \$1,480? [9]

A. Moneys due and owing the Bank of Fairbanks.

Q. He got moneys due?

A. I mean it was due the Bank of Fairbanks.

Q. Why was it due the Bank of Fairbanks?

A. Because he was indebted to us at that particular time for some \$12,000.

(Testimony of Ralph Bailey.)

Q. For what?

A. Some \$12,100. He was indebted to the Bank of Fairbanks at that particular time.

Q. But this \$1,480, was he indebted to you for that amount?

A. That is correct. Our instruments indicate that if any legal fees have been charged up against an account that is past due or owing, I believe you will find that we are allowed to take moneys and funds from the accounts that are properly due and owing.

Q. What is the nature of this case 7114, do you know? A. Yes.

Q. What is it?

A. It is a foreclosure on a piece of property.

Q. What do you mean, "a foreclosure on a piece of property"?

Mr. Johnson: It seems to me, your Honor, that that is as good an answer as could be expected from the witness. He is not a lawyer. [10]

The Court: It is a mortgage foreclosure, isn't it?

The Witness: That is correct.

Q. (By Mr. McNabb): Was the indebtedness of Mr. Kaye to the bank evidenced by a promissory note?

A. Secured by property documents, with security a piece of property.

Q. Are there notes which are secured by a mortgage? A. That is correct.

(Testimony of Ralph Bailey.)

Q. And this action 7114 was a mortgage foreclosure? A. That is correct.

Q. And the notes were at that time in default on more than one of them?

A. That is correct.

Q. Now, then, did you charge Mr. Kaye's account with any of the money that was due on those debts—on the notes? A. Would you repeat?

Q. Did you charge Mr. Kaye's account and take money from his account to apply on the notes?

A. I have previously to this.

Q. But did you on this debt?

A. Not on that debt, no. That went for another purpose.

Q. Is there still money due you?

A. There is.

Q. And Mr. Kaye has money in your bank? [11]

A. He does.

Q. Have you charged him subsequently with any—— A. I have not.

Q. What you did, then, was charge him for the money which you had paid to Mr. Johnson? That is what this Plaintiff's Exhibit A shows, this was attorney's fees? A. That is right.

Q. And it had nothing to do with the debt?

A. It could have because we would have the right to put it on the reverse side and add it to our notes. Rather than that, I took it from our account. I could have done it one of two ways.

Q. Did Mr. Kaye authorize you to employ Mr. Johnson? A. No.

(Testimony of Ralph Bailey.)

Q. Let me ask you again, Mr. Bailey, what did Mr. Kaye get for his \$1,480?

A. \$12,100, part of it which was in default.

Q. What part.

A. Well, it is a debt due and owing. I could have increased the notes on the reverse side of the note and added it to there and not take out of the account what I could take out of the account, and I had charged his account previously the same way.

Q. But the loans had been made previous to the 23rd or 24th or 25th of October, when his account was charged? [12]

A. That is correct. Those funds we put up in the bank in April, 1952.

Q. So he didn't get twelve thousand, did he?

A. He didn't get it. He owed it. It was long past due.

Q. I ask you again; what did he get for his \$1,480?

A. He, individually, lost. He didn't get anything.

Q. He didn't get anything, did he?

A. No, I grant you that.

Q. What was the consideration for the \$1,480 which you took from his account?

A. The way you are putting it, nothing.

Q. Not a thing? A. Not a thing.

Q. And he didn't authorize you to take it out of there and pay it to Maurice Johnson, did he?

A. No.

(Testimony of Ralph Bailey.)

Q. Neither verbally nor in writing?

A. Not for this specific case, no.

Q. And that case is still pending, isn't it, the Bank of Fairbanks against Kaye?

A. Yes, waiting for the Judge's decision.

Mr. McNabb: That is all. [13]

Cross-Examination

By Mr. Johnson:

Q. Mr. Bailey, at the time that this transaction occurred, how much was Mr. Kaye indebted to the bank in principal?

Mr. McNabb: Just a minute. I object to that on the ground that it has no bearing on the issues in this case.

The Court: Read that question, please.

(Thereupon the reporter read the last question.)

Mr. Johnson: It certainly does have a bearing on the case.

The Court: Objection overruled.

Mr. Johnson: Go ahead, Mr. Bailey.

A. \$12,100 plus interest. That is principal you asked for. \$12,100.

Q. \$12,100? A. Yes.

Q. And that was past due at that time, was it?

A. That is correct.

Q. In addition to that principal sum, what sums were due and owing?

(Testimony of Ralph Bailey.)

A. Interest from various different dates to that particular date.

Q. And were costs and attorney's fees also due and owing?

Mr. McNabb: Just a minute.

A. That is correct. [14]

Mr. McNabb: I object to that as calling for a conclusion and move that the answer be stricken.

The Court: It may be stricken.

Q. (By Mr. Johnson): What else was due and owing, if anything, at that time, in addition to accrued interest?

A. If my memory is correct, there was nothing else.

Q. These items that appear on this exhibit, had they been incurred prior to the date of that exhibit?

Mr. McNabb: Just a minute. I am going to object to that——

A. That is correct.

Mr. McNabb: Wait a minute, Mr. Bailey.

The Witness: Excuse me.

The Court: State your objection.

Mr. McNabb: It calls for a conclusion, it is not the best evidence, and he has already testified that the charges on here were incurred by the bank and not by Mr. Kaye, and that he had not employed or authorized the payment of those charges.

Mr. Johnson: I still think the question is significant, your Honor.

The Court: Read the question, please.

(The reporter read the last question.)

(Testimony of Ralph Bailey.)

The Court: Objection overruled. You may answer.

Q. (By Mr. Johnson): Had that been incurred by you prior to the time of [15] that exhibit?

A. That is correct.

Q. When did you start this foreclosure suit, No. 7114, do you recall?

A. Sometime in April, 1952.

Q. I will show you the complaint in case No. 7114, that bears a file mark April 23, 1952. Is that about the time you started that case, to your recollection? A. That is correct.

Q. The case had been pending and still is pending; is that correct? A. That is correct.

Q. As far as you know? A. That is right.

Mr. McNabb: That has already been testified to.

Q. (By Mr. Johnson): And when the charges were made as appear on that exhibit, Plaintiff's Exhibit A, they constituted part of the indebtedness that was then owed by Mr. Kaye to the Bank of Fairbanks by reason of these mortgages and notes; is that correct? A. That is correct.

Mr. McNabb: Just a minute. I object to that and move that the answer be stricken on the ground that the testimony is that the plaintiff here didn't employ Mr. Johnson. It is [16] not the best evidence and calls for a conclusion of the witness as to charges made for the account of the attorney for the defendant.

The Court: Isn't there a clause in the mortgage

(Testimony of Ralph Bailey.)

that if a foreclosure is commenced that they are authorized to expend whatever money is necessary, and so forth?

Mr. Johnson: Yes, sir, there is such a clause in the mortgage.

The Clerk: Defendant's Identification A.

Mr. Johnson: Make this a collective exhibit, mortgages, Exhibits A through D.

The Clerk: That is Identification A, defendant's.

(Mortgages attached to complaint in cause No. 7114 as Exhibits A, B, C and D, were marked Defendant's Identification A.)

Q. (By Mr. Johnson): I will show you Defendant's Identification A, which is a collective exhibit that is attached to the complaint in case No. 7114. Will you examine those briefly and tell what they are, if you know? There are four exhibits, A, B, C and D.

A. Exhibit A is a real and chattel mortgage. It is a copy thereof, of a real and chattel mortgage.

Q. And Exhibit B?

A. Is a mortgage. [17]

Q. Is that a copy?

A. Copy of a mortgage. Exhibit C is a mortgage, also a chattel, a copy thereof. Exhibit D is also a real and chattel mortgage or a copy thereof.

Q. These four copies, being A, B, C and D, are copies of the mortgages that are being foreclosed in the action known as 7114?

(Testimony of Ralph Bailey.)

A. It is presumed so. I mean I haven't read them clear through.

Mr. Johnson: We would like, if the Court please, to offer as Defendant's Exhibit 1 the collective identification A.

Mr. McNabb: Your Honor, I am going to object to the admission of these instruments on the ground, first, that the first of these mortgages which have been offered does not mention the payment by the plaintiff here of attorney's fees to the defendant corporation. It is mentioned in the note but not in the mortgage. In the second of the mortgages it provides that in the event of sale on foreclosure that a reasonable attorney fee shall be paid from the sale of the mortgaged property, and that same provision is to be found in the third and fourth mortgages, and there has been no sale here of the property. This cause has not gone to judgment. The only statement in the mortgage concerning the payment of attorney fees is "he may proceed to sell said [18] chattels at public auction in the manner provided by law for the sale of personal property under execution, and, from the proceeds thereof, shall pay, first, all expenses of seizure, keeping, and sale of said property, including a reasonable fee for mortgagee's attorney."

After a hasty perusal, your Honor, those are the only matters that I find in any one of these instruments.

Mr. Johnson: If the Court please, the notes are

(Testimony of Ralph Bailey.)

part of the mortgage as well as the mortgage itself, and copies of the notes are attached to these copies of the mortgage, so I believe that all of these things are pertinent or germane to the issue.

Mr. McNabb: But that is a mortgage foreclosure, your Honor, and in an action on the note there is no debt due on a note at any time until such mortgage foreclosure is decreed.

Mr. Johnson: The action is asking for judgment, if the Court please, for the amount due, as well as for the foreclosure of the mortgage, and the notes themselves provide that "if the note is not paid at maturity and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection, including reasonable attorney's fees." Each of the notes has that same provision and they become part of this transaction.

The Court: I don't find copies to all of these notes. Do you have them there? [19]

Mr. Johnson: These are the originals, your Honor. I was going to offer these.

The Court: All of the notes provide that if suit is brought or if it is placed in the hands of an attorney for collection, the makers of the note will pay the costs, and of course the note is a part of the mortgage and the mortgage foreclosure, so the contract would authorize Mr. Bailey in debiting the account and applying it on those attorney's fees.

Mr. Johnson: Then, I take it that this exhibit is admitted in evidence; is that correct?

(Testimony of Ralph Bailey.)

The Court: I think the notes are pretty hard to find, there are so many pages.

Mr. Johnson: We will get them back.

The Witness: We have duplicate copies.

The Clerk: Defendant's Identification B.

(Four notes signed by Kaye were marked Defendant's Identification B.)

Q. (By Mr. Johnson): I will hand you Defendant's Identification B, which is a collective identification containing what purports to be four signed promissory notes and will ask you to identify those, if you can.

A. These are four separate notes.

Q. Are they signed by A. L. Kaye?

A. That is correct. [20]

Q. And anyone else? A. Also Jean Kaye.

Q. And are they payable to the Bank of Fairbanks?

A. They are payable to the Bank of Fairbanks.

Q. Did they constitute the evidences of the indebtedness due the Bank of Fairbanks at the time the foreclosure suit was started in April, 1952?

A. That is correct.

Q. And did they also constitute the evidence of indebtedness to the bank in October of 1952 at the time this debit was made?

A. That is correct.

Mr. Johnson: We would like to offer defendant's collective identification B.

(Testimony of Ralph Bailey.)

Mr. McNabb: May I ask this witness a question in reference to these at this time, your Honor?

Mr. Johnson: I have offered them, your Honor.

The Court: He has offered them. All right, you may ask a question if you like.

Mr. McNabb: Do these notes indicate that there was \$12,000 due in October of 1952, the 24th of October of 1952?

The Witness: Yes, some twelve thousand plus.

Mr. McNabb: No objection.

The Court: They may be admitted.

The Clerk: Defendant's Exhibit No. 1. [21]

(The four notes signed by Kaye, previously marked Defendant's Identification B, were received in evidence as Defendant's Exhibit 1.)

DEFENDANT'S EXHIBIT No. 1

Kaye, A. L.

No. M-423

Fairbanks, Alaska, January 30, 1950

\$5,000.00

\$1,000.00 on or before December 1, 1950

\$4,000.00 on or before December 31, 1950, after date, for value received

We jointly and severally promise to pay to the order of Bank of Fairbanks, at its office in Fairbanks, Alaska, Five Thousand and no/100ths Dollars with interest from date..... at the rate of eight per cent per annum, payable quarterly and at maturity until paid. If interest is not paid when due, or if principal is not paid at maturity, then the interest and principal to draw interest from maturity hereof until paid, at the rate of eight per cent per annum. If default be made in the payment of any installment of interest when due then the whole of this note, both principal and interest, shall forthwith become due and

(Testimony of Ralph Bailey.)

Defendant's Exhibit No. 1—(Continued)

payable without demand at the option of the holder of the note. Principal and interest are payable only in Legal Currency of the United States of America. For value received, each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment, any release or discharge arising from any extension of time, discharge of a prior party, or from any cause other than actual payment in full hereof, binds himself hereon as a principal, not as a surety, and promises, if this note is not paid at maturity and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection, including reasonable attorney's fees, and agrees that, at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division of Alaska.

A. L. KAYE,
JEAN KAYE.

Address: Box 550.

Security: Real & Chattel Mortgage on Home.

Fairbanks, Alaska,....., 19....

For value received, I hereby guarantee the payment of the within note, consent to any extension of time granted maker, and waive demand, notice of protest and of non-payment thereof.

Payments				
Date	Interest Paid To	Interest	Apply Principal	Balance Due
3/ 1/50	3/ 1/50	\$ 33.33		\$5,000
3/20/50	4/ 1/50	33.33		5,000
4/28/50	5/ 1/50	33.33		5,000
5/31/50	6/ 1/50	33.33		5,000
6/30/50	7/ 1/50	33.33		5,000
7/22/50	8/ 1/50	33.33		5,000
8/22/50	9/ 1/50	33.33		5,000
10/21/50	10/ 1/50	33.33		5,000
12/21/50	11/ 1/50	100.00		5,000
3/16/51	4/ 1/51	100.00		5,000
9/11/51	10/ 1/51	200.00		5,000
10/13/51	10/ 8/51	7.78		5,000

(Testimony of Ralph Bailey.)

Defendant's Exhibit No. 1—(Continued)

Kaye, A. L.

No. M-180

Fairbanks, Alaska, November 22, 1948

\$6,300.00

For value received, we jointly and severally promise to pay to the order of Bank of Fairbanks, at its office in Fairbanks, Alaska, Six Thousand Three Hundred and no/100ths Dollars with interest from.....at the rate of eight per cent per annum until this note is fully paid. Principal payable \$500.00 per month on the 22nd day of each month, beginning December 22, 1948, and continuing until this note is paid in full.

The amount of interest due on this note is to be paid at the same time the principal installments are paid. If any such installments of principal or interest is not paid when due, the whole sum of principal and interest shall at the option of the holder become immediately due and payable. Principal and interest are payable only in Legal Currency of the United States of America. For value received each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment binds himself hereon as a principal, not as surety, and promises, if this note is not paid at maturity and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection including reasonable attorney's fees, and agrees that at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division of Alaska.

A. L. KAYE,
JEAN KAYE.

Security: Mortgage.

Mailing Address: Box 550.

Living Address:

Fairbanks, Alaska,....., 19....

For value received, I hereby guarantee the payment of the within note, consent to any extension of time granted maker, and waive demand, notice of protest and of non-payment thereof.

.....
.....

(Testimony of Ralph Bailey.)

Defendant's Exhibit No. 1—(Continued)

Payments

Date	Interest Paid To	Interest	Apply Principal	Balance Due
2/ 2/49	1/22/49	\$ 84.00		\$6,300
2/21/49	2/22/49	42.00		6,300
3/26/49	3/22/49	42.00		6,300
4/25/49	4/22/49	42.00		6,300
6/ 3/49	5/22/49	42.00		6,300
6/27/49	6/22/49	42.00		6,300
7/29/49	7/22/49	42.00		6,300
8/23/49	8/22/49	42.00		6,300
10/ 1/49	9/22/49	42.00		6,300
10/22/49	10/22/49	42.00		6,300
10/29/49	11/22/49	42.00		6,300
12/28/49	12/22/49	42.00		6,300
1/25/50	1/22/50	42.00		6,300
3/ 1/50	2/22/50	42.00		6,300
3/20/50	3/22/50	42.00		6,300
4/28/50	4/22/50	42.00	300	6,000
5/31/50	5/22/50	40.00	300	5,700
6/30/50	6/22/50	38.00	300	5,400
7/22/50	7/22/50	36.00	300	5,100
8/22/50	8/22/50	34.00	300	4,800
10/24/50	10/22/50	64.00		4,800
12/21/50	1/ 1/51	74.02	700	4,100
3/16/51	4/ 1/51	82.00		4,100
9/11/51	10/ 1/51	164.00		4,100
10/13/51	10/ 8/51	6.38		4,100

Kaye, A. L.

No. M-39

Fairbanks, Alaska, May 8, 1945

\$10,000.00

For value received, we jointly and severally promise to pay to the order of Bank of Fairbanks, at its office in Fairbanks, Alaska, Ten Thousand and no/100ths Dollars with interest from date at the rate of eight per cent per annum until this note is fully paid. Principal payable \$300.00 per month on the 8th day of each

(Testimony of Ralph Bailey.)

Defendant's Exhibit No. 1—(Continued)

month, beginning June 8, 1945, and continuing until this note is paid in full.

The amount of interest due on this note is to be paid at the same time the principal installments are paid. If any such installments of principal or interest is not paid when due, the whole sum of principal and interest shall at the option of the holder become immediately due and payable. Principal and interest are payable only in Legal Currency of the United States of America. For value received each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment binds himself hereon as a principal, not as surety, and promises, if this note is not paid at maturity and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection including reasonable attorney's fees, and agrees that at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division of Alaska.

A. L. KAYE,
JEAN KAYE.

Security: Real Estate Mortgage.

Mailing Address:

Living Address:

Fairbanks, Alaska,....., 19....

For value received, I hereby guarantee the payment of the within note, consent to any extension of time granted maker, and waive demand, notice of protest and of non-payment thereof.

.....
.....

(Testimony of Ralph Bailey.)

Defendant's Exhibit No. 1—(Continued)

Payments

Date	Interest Paid To	Interest	Apply Principal	Balance Due
				\$3,400
1/14/49			200	3,200
2/ 2/49	1/24/49	203.55	300	2,900
2/21/49	2/24/49	19.34	500	2,400
3/26/49	3/24/49	16.01	500	1,900
4/25/49	4/24/49	12.67	500	1,400
6/ 3/49	5/24/49	9.34	500	900
6/27/49	6/24/49	6.00		900
7/29/49	7/24/49	6.00		900
8/23/49	8/24/49	6.00		900
10/ 1/49	9/24/49	6.00		900
10/22/49	10/24/49	6.00		900
10/20/49	11/24/49	6.00		900
12/28/49	12/24/49	6.00		900
1/25/50	1/24/50	6.00		900
3/ 1/50	2/24/50	6.00		900
3/20/50	3/24/50	6.00		900
4/28/50	4/24/50	6.00		900
5/31/50	5/24/50	6.00		900
6/30/50	6/24/50	6.00		900
7/22/50	7/24/50	6.00		900
8/22/50	8/24/50	6.00		900
10/21/50	9/24/50	6.00		900
12/21/50	1/ 1/51	20.00		900
3/16/51	4/ 1/51	18.00		900
9/11/51	10/ 1/51	36.00		900
10/13/51	10/ 8/51	1.40		900

(Testimony of Ralph Bailey.)

Defendant's Exhibit No. 1—(Continued)

Kaye, A. L.

No. M-483

Fairbanks, Alaska, February 3, 1951

\$5,000.00

On or before one year after date, for value received.

We jointly and severally promise to pay to the order of Bank of Fairbanks at its office in Fairbanks, Alaska Five Thousand and no/100ths Dollars with interest from date..... at the rate of eight per cent per annum, payable quarterly and at maturity until paid. If interest is not paid when due, or if principal is not paid at maturity, then the interest and principal to draw interest from maturity hereof until paid, at the rate of eight per cent per annum. If default be made in the payment of any installment of interest when due then the whole of this note, both principal and interest, shall forthwith become due and payable without demand at the option of the holder of the note. Principal and interest are payable only in Legal Currency of the United States of America. For value received, each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment, any release or discharge arising from any extension of time, discharge of a prior party, or from any cause other than actual payment in full hereof, binds himself hereon as a principal, not as a surety, and promises, if this note is not paid at maturity and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection, including reasonable attorney's fees, and agrees that, at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division of Alaska.

A. L. KAYE,
JEAN KAYE.

(Testimony of Ralph Bailey.)

Defendant's Exhibit No. 1—(Continued)

Address:

Security: Real & Chattle Mortgage.

Fairbanks, Alaska,....., 19....

For value received, I hereby guarantee the payment of the within note, consent to any extension of time granted maker, and waive demand, notice of protest and of non-payment thereof.

.....

.....

Payments

Date	Interest Paid To	Interest	Apply Principal	Balance Due
3/16/51	4/ 1/51	64.44		\$5,000.00
9/11/51	10/ 1/51	200.00		5,000.00
10/13/51	10/ 8/51	7.78		5,000.00
11/ 9/51	11/ 8/51	33.33	606.67	4,393.33
12/11/51	12/ 8/51	29.29	501.21	3,892.12
2/11/52	2/ 8/52	51.90	247.43	3,644.69
3/10/52	3/ 8/52	24.30	270.37	3,374.32
3/12/52	3/ 8/52		57.50	3,316.82
4/16/52	4/ 8/52	22.11	328.73	2,988.09
7/21/52	7/21/52	69.73	888.09	2,100.00

Received in evidence October 8, 1953.

Mr. Johnson: That is all.

Mr. McNabb: That is all the questions I have.

(Witness excused.)

ALVIN LEON KAYE

a witness called in behalf of the plaintiff, was sworn and testified as follows:

Direct Examination

By Mr. McNabb:

Q. Would you state your name please, sir?

A. Alvin Leon Kaye.

Q. Where do you reside, Mr. Kaye?

A. Fairbanks, Alaska.

Q. How long have you resided here, sir?

A. Since 1939.

Q. Have you had a bank account in the Bank of Fairbanks since you have been a resident of Fairbanks?

A. Since the starting of the bank, yes.

Q. Did you have an account there on the 24th of October of 1952?

A. I did.

Q. I would like to show you Plaintiff's Exhibit A and ask if you know what that is, please, sir. [22]

A. Yes.

Q. What is it?

A. It is a charge made to my account by the Bank of Fairbanks of \$1,480.

Q. Upon what day was that charge apparently made?

A. On October—it is typed October 23, 1952.

Q. Do you know what that charge was made for?

A. Yes.

Q. What was it made for?

(Testimony of Alvin Leon Kaye.)

A. According to this, for the Bank of Fairbanks' attorney's fees and marshal and court costs.

Q. And do you know to whom that money was paid?

A. According to this it states that it was paid to Maurice Johnson.

Q. Did you ever authorize the bank to employ Mr. Johnson? A. No.

Q. Has Mr. Johnson ever represented you? Was Mr. Johnson representing you on the 24th of October of 1952? A. No.

Mr. McNabb: That is all.

Mr. Johnson: No questions.

(Witness excused.)

Mr. McNabb: The plaintiff rests, your Honor.

The Court: Very well. [23]

(Thereupon counsel presented closing arguments to the Court.)

The Court: This contract on the note that the maker of the note would pay attorney's fees if an attorney is employed, if it is put in his hands for collection, or even the later thing, if a suit is brought—in this case both of those things had been done and the contract then became in full force. They didn't have to wait until the case was over and the attorney didn't have to wait until he got through the case before he got any money. You know, as a matter of fact, attorneys don't do that. They usually make a charge at the beginning of the case for their attorney's fees, and this contract set

forth on the note that if a suit was even brought or if it was placed in the hands of an attorney, even that far back, the attorney's fee was covered, so I think it is covered in this case all the way through, and I find for the defendant, the Bank of Fairbanks.

Mr. Johnson: I will prepare the findings and judgment.

The Court: Yes. Very well.

Mr. Johnson: If the Court please, may we have leave to withdraw these notes and substitute copies? The original notes are a part of the exhibit.

The Court: Yes.

Mr. Johnson: Very well, thank you.

(Thereupon, at 11:30 a.m., October 8, 1953, the trial of this cause was concluded.)

[Endorsed]: Filed October 23, 1953. [24]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered that this cause came on for trial before the above-entitled Court, without a jury, on the 8th day of October, 1953, at 10:00 o'clock a.m., at which time the said cause had theretofore been set for trial. The issues were joined on the Complaint of the Plaintiff and the Answer of the Defendant. The Plaintiff appeared in person and

by his attorney, George B. McNabb, Jr. The Defendant appeared by Ralph C. Bailey, its vice president, and by Maurice T. Johnson, its attorney; and the Court having heard the testimony of the witnesses, and having considered the evidence and exhibits, and having heard the arguments of counsel, does now make and order filed herein, the following:

FINDINGS OF FACT

I.

That the allegations contained in Paragraph III of the Plaintiff's Complaint are not true.

II.

That the funds deposited in the Defendant Bank, by the Plaintiff, were the property of the Plaintiff, and that said funds were deposited without instructions, and that at the time of said deposit the Plaintiff was indebted to the Defendant Bank in a sum far in excess of said deposit, which indebtedness included principal, interest, attorney's fees and costs, and that the said items of indebtedness were due and owing from the Plaintiff to the Defendant Bank at the time the Defendant Bank debited the account of the Plaintiff in the sum of \$1,480.00; and that the Defendant applied the said sum of \$1,480.00 on deposit in the name of the Plaintiff as a part payment of the indebtedness then due and owing by the Plaintiff to the Defendant Bank, namely, on the 24th day of October, 1952.

And from the foregoing Findings of Fact, said Court does now make and enter the following:

CONCLUSIONS OF LAW

I.

That the Plaintiff should take nothing by his Complaint.

II.

That the Defendant should have and recover of and from the Plaintiff the sum of \$322.00 for Defendant's reasonable attorney's fees in this action, and for the Defendant's costs and disbursements herein to be taxed by the Clerk of this Court.

Done at Fairbanks, Alaska, this 12th day of October, 1953.

/s/ HARRY E. PRATT,
District Judge.

Service of Copy acknowledged.

Lodged October 8, 1953.

[Endorsed]: Filed October 12, 1953.

In the District Court for the District of Alaska,
Fourth Division

No. 7309

A. L. KAYE,

Plaintiff,

vs.

BANK OF FAIRBANKS, a Banking Corporation,
Defendant.

JUDGMENT AND DECREE

Be It Remembered that this cause came on for trial before the above-entitled court, without a jury, on the 8th day of October, 1953, at 10:00 o'clock a.m., at which time the said cause had theretofore been set for trial. The issues were joined on the Complaint of the Plaintiff and the Answer of the Defendant. The Plaintiff appeared in person and by his attorney, George B. McNabb, Jr. The Defendant appeared by Ralph C. Bailey, its vice president, and by Maurice T. Johnson, its attorney; and the Court having heard the testimony of the witnesses, and having considered the evidence and exhibits, and having heard the arguments of counsel, and having heretofore made and ordered filed herein its Findings of Fact and Conclusions of Law, and the Court being fully advised in the premises;

It Is Hereby Ordered, Adjudged and Decreed that the Plaintiff take nothing by his Complaint herein.

It Is Further Ordered, Adjudged and Decreed

that the Defendant, Bank of Fairbanks, above named, have and recover of and from the Plaintiff, A. L. Kaye, above named, the sum of \$322.00 for Defendant's reasonable attorney's fees herein and for Defendant's costs and disbursements herein to be taxed by the Clerk of this Court in the sum of \$4.00.

Let execution issue therefor after ten days from the date hereof.

Done at Fairbanks, Alaska, this 12th day of October, 1953.

/s/ HARRY E. PRATT,
District Judge.

Service of Copy acknowledged.

[Endorsed]: Filed and entered October 12, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes Now, the above-named Plaintiff, by his Attorney, George B. McNabb, Jr., and does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the Judgment entered in the above-entitled cause on the 8th day of October, 1953.

/s/ GEORGE B. McNABB, JR.,
Attorney for Plaintiff.

Service of Copy acknowledged.

[Endorsed]: Filed October 21, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings in this cause listed in the Designation of Record of the plaintiff and appellant and the Additional Designation of Record filed by the defendant and appellee, viz:

	Pages
1—Complaint	1 to 2
2—Answer	3 to 4
3—Transcript of Proceedings of October 8, 1953	5 to 31
4—Findings of Fact and Conclusions of Law	32 to 33
5—Judgment and Decree.....	34
6—Notice of Appeal.....	35
7—Statement of Points.....	36
8—Designation of Record.....	37
9—Additional Designation of Record..	38

Plaintiff's Exhibit "A" and Defendant's Exhibit "B" in enclosed white envelope.

Witness my hand and the seal of the above-entitled Court this 29th day of October, 1953.

/s/ JOHN B. HALL,
Clerk of Court.

[Endorsed]: No. 14110. United States Court of Appeals for the Ninth Circuit. A. L. Kaye, Appellant vs. Bank of Fairbanks, a Corporation, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division.

Filed November 2, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth District.

United States Court of Appeals
for the Ninth Circuit

No. 14110

A. L. KAYE,

Plaintiff-Appellant,

vs.

BANK OF FAIRBANKS, a Banking Corporation,
Defendant-Appellee.

STATEMENT OF POINTS

The points upon which Plaintiff-Appellant will rely on appeal are:

1. The Judgment and Decree are contrary to the evidence.

2. The Judgment and Decree are contrary to the Law.

3. The Court erred in overruling Plaintiff's objection to testimony of Defendant's witness Bailey.

/s/ GEORGE B. McNABB, JR.,
Attorney for Plaintiff-
Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed December 17, 1953.

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For the Ninth Circuit

A. L. KAYE,

Plaintiff-Appellant,

vs.

BANK OF FAIRBANKS,

a Banking Corporation,

Defendant-Appellee.

APPELLANT'S BRIEF.

GEORGE B. McNABB, JR.,

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FILED

APR 27 1954

PAUL P. O'BRIEN
CLERK

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BANK OF FAIRBANKS,

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APPELLANT'S BRIEF.

**STATEMENT OF THE PLEADINGS AND FACTS DISCLOS-
ING THE BASIS OF THE DISTRICT COURT'S JURIS-
DICTION AND THIS COURT'S JURISDICTION TO RE-
VIEW.**

The jurisdiction of the District Court for the Ter-
ritory of Alaska, is provided by Title 48 U.S.C.A.,
Section 101, reading as follows:

“There is established a District Court for the
District of Alaska, with the jurisdiction of dis-
trict courts of the United States and with gen-
eral jurisdiction in civil, criminal, equity, and
admiralty causes; * * *”

The jurisdiction of this Court is provided by the provisions of Title 28 U. S. C. A., Section 1291, reading as follows:

“The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, the District Court for the Territory of Alaska, * * * except where a direct review may be had in the Supreme Court.”

The decision here appealed from is a final decision as it is a judgment in favor of Defendant and awarding the Defendant attorney's fees and costs (Tr. 38).

The venue of this Court is established by Title 28, U.S.C.A., Section 1294 (2).

STATEMENT OF THE CASE.

On the 23rd day of April, 1952, the Bank of Fairbanks, an Alaskan Banking Corporation, filed a complaint in the District Court for the District of Alaska, Fourth Division, Cause #7114, against A. L. Kaye, Jean Kaye and Josephine Boussard, Defendants, acting by and through its attorney Maurice T. Johnson of Fairbanks, Alaska. The complaint sought the foreclosure of four real and chattel mortgages which were executed by A. L. Kaye and Jean Kaye, and which secured four promissory notes, which notes the Plaintiff Bank of Fairbanks alleged to be past due. The Bank alleged that A. L. Kaye and Jean Kaye were then indebted to it in the approximate amount

of Twelve Thousand One Hundred (\$12,100.00) Dollars, plus interest on said amount at the rate of eight (8%) per cent per annum.

The complaint further alleged that Josephine Bousard claimed an interest in the real and personal property, the subject of the mortgages given to secure the promissory notes.

The Bank also sought the recovery of One Thousand Five Hundred (\$1,500.00) Dollars as a reasonable attorney fee for Plaintiff Bank's attorney.

On the 25th day of June, 1952, A. L. Kaye and Jean Kaye filed their answer, admitting the execution of the notes and mortgages, but alleging affirmatively that the interest of A. L. Kaye and Jean Kaye in and to the mortgaged property had been acquired by Josephine Boussard with the knowledge and consent of the Plaintiff Bank; and that the said Boussard had, since the 10th day of November, 1953, paid monthly installments of Two Hundred (\$200.00) Dollars toward the purchase of said encumbered property and in addition thereto had paid interest on the unpaid balance of the Fifteen Thousand (\$15,000.00) Dollars purchase price at the rate of eight (8%) per cent per annum, each of which payments had been applied to the indebtedness of Defendants A. L. Kaye and Jean Kaye to the Plaintiff Bank and that said Bank had acceded to said arrangement and had waived its right to foreclose the mortgages as prayed. A similar answer was filed by Josephine Boussard on the 12th day of June, 1952.

On the 23rd day of October, 1952, the Plaintiff Bank did charge the special account of A. L. Kaye and did summarily remove therefrom the sum of One Thousand Four Hundred Eighty (\$1,480.00) Dollars, of which amount One Thousand Four Hundred Fifty (\$1,450.00) Dollars was alleged by said Bank to have been paid to Maurice T. Johnson, Attorney at Law, as a retainer in the action entitled Bank of Fairbanks, an Alaskan Banking Corporation vs. A. L. Kaye, Jean Kaye and Josephine Boussard, Cause #7114, in the District Court for the District of Alaska, Fourth Division, while Twenty One (\$21.00) Dollars was alleged to have been paid by said Bank to the Clerk of the District Court as a filing fee and the remaining Nine (\$9.00) Dollars to the United States Marshal for the Fourth Division of Alaska for serving the summons and complaints in said cause (Tr. 10 and 11).

On the 7th day of November, 1952, A. L. Kaye, Plaintiff-Appellant herein, did file in the District Court for the District of Alaska, Fourth Division, Cause #7309, entitled A. L. Kaye, Plaintiff vs. The Bank of Fairbanks, a Banking Corporation, Defendant, thereby seeking the recovery from the Defendant of the One Thousand Four Hundred Eighty (\$1,480.00) Dollars removed by the Defendant-Appellee from the Plaintiff's account on the 23rd day of October, 1952, and Plaintiff's costs, disbursements and a reasonable attorney fee (Tr. 3 and 4).

In its answer, the Defendant Bank admitted its existence as a banking corporation and did admit that on the 23rd day of October, 1952, the Plaintiff had on deposit in said Bank the sum of One Thousand Four Hundred Eighty (\$1,480.00) Dollars, which was the property of the Plaintiff Kaye.

Said Bank denied that it had converted said One Thousand Four Hundred Eighty (\$1,480.00) Dollars to its use and alleged affirmatively that the Plaintiff Kaye was, on the 23rd day of October, 1953, indebted to the Defendant Bank in a sum far in excess of said deposit; and that Defendant Bank had applied the funds on deposit in the name of Plaintiff as part payment of the indebtedness then due and owing by the Defendant to the Plaintiff Bank (Tr. 4 and 5).

This cause was heard before the Honorable Harry E. Pratt, Judge, District Court, District of Alaska, Fourth Division, sitting at Fairbanks, Alaska, on the 8th day of October, 1953.

Mr. Ralph Bailey, vice-president of the Defendant Bank, testified that the special account of A. L. Kaye was charged One Thousand Four Hundred Eighty Dollars (\$1,480.00) by said Bank on the 23rd day of October, 1953, and a debit slip evidencing such charge was admitted as Plaintiff's exhibit A (Tr. 10 and 11).

Mr. Bailey further testified that the money which had been removed from the Plaintiff's account was used by the Defendant Bank to pay Maurice T. Johnson, the bank's attorney, for the services performed

by said attorney in instituting cause #7114, the same being entitled, Bank of Fairbanks, An Alaskan Corporation, Plaintiff vs. A. L. Kaye, Jean Kaye and Josephine Boussard (Tr. 12).

Mr. Bailey further testified that Mr. Johnson was the Bank's attorney (Tr. 13); that cause #7114 had not proceeded to judgment, (Tr. 14); that Mr. Kaye had not authorized the Bank to employ Mr. Johnson (Tr. 16); that the One Thousand Four Hundred Eighty (\$1,480.00) Dollars had not been applied to the debt evidenced by the notes (Tr. 16); that Mr. Kaye received nothing in consideration for the One Thousand Four Hundred Eighty (\$1,480.00) Dollars removed from his account (Tr. 17); and that in fact cause #7114, Bank of Fairbanks vs. Kaye, was still pending (Tr. 18 and 20).

Four promissory notes (Defendant's Exhibits 1, 2, 3, and 4) were admitted by the trial Court (Tr. 25-32 incl.), which evidenced the indebtedness of A. L. Kaye and Jean Kaye to the Defendant Bank, each of which notes, according to the testimony of Bailey, was secured by a real and chattel mortgage, which mortgages were sought by the Bank to be foreclosed by cause #7114 (Tr. 21).

The Plaintiff Kaye testified that he had on deposit in the Defendant Bank the sum of One Thousand Four Hundred Eighty (\$1,480.00) Dollars on the 24th day of October, 1952; that the Bank did on said day, without authority, charge his account with that amount and did pay same to Maurice T. Johnson, an

attorney in the employ of the Defendant Bank (Tr. 33-34).

That trial Court held that on the 24th day of August, 1952, the Plaintiff Kaye was indebted to the Defendant Bank in the amount of One Thousand Four Hundred Eighty (\$1,480.00) Dollars, which amount the Bank had previously paid to its attorney, and that the Bank was entitled to charge the account of the Plaintiff for such amount (Tr. 36).

SPECIFICATION OF ERRORS.

The Appellant specified as error that the Court erred in that its judgment is contrary to the evidence and contrary to the applicable law.

ARGUMENT.

As a general rule a bank may look to deposits in its hands for the repayment of any indebtedness to it on the part of the depositor and may apply the debtor's deposits on his debts to the bank as they become due. See *C. A. Eaton Co. v. L. Mark Shoes*, (DC Pa.), 37 F 2d 715; *Am Bank and Trust Co. v. Morris* (CCA 5th) 16 F 2d 845; *G. D. Harter Bank of Canton v. Inglis* (CCA 6th) 6 F 2d 841, cert. den. 46 S. Ct. 103, 269 U. S. 576; *Corbett et al. v. Klein Smith et al.* (CCA 6th), 112 F 2d 511; 9 C. J. S. 614, §296.

The right of a bank to appropriate the funds of a depositor is limited to the claims of the bank against

the depositor, which are liquidated or susceptible of liquidation by a mere process of calculation. *Thornton v. National City Bank of New York*, (CCA 2d) 45 F 2d 127; 1 Morse on Banks and Banking (6th edition) §335, pp. 779, 780; *Steingut v. Guaranty Trust Company of New York*, 58 F. Supp. 623; 3 C.J.S. 620, §297.

A "liquidated claim" is one which the debtor does not in good faith dispute. *Virginia-Carolina Elec. Works v. Cooper*, 63 SE 2d 717.

An "unliquidated claim" is one the amount of which has not been fixed by agreement or can not be exactly determined by the application of rules of arithmetic or of law, while a "liquidated claim" is the opposite. *State for Use of Warner Co. v. Massachusetts Bonding and Insurance Co.*, 9 A 2d 77.

"Liquidated" means declared by the parties as to amount; *U. S. v. Bethlehem Steel Co.*, 205 U.S. 105; *Maryland Steel Co. v. U.S.*, 235 U.S. 451, 35 S.Ct. 190; or fixed by operation of law. *U. S. v. Skinner and Eddy Corporation*, 28 F 2d 373.

"Liquidated" means made certain as to what and how much is due; made certain by agreement of the parties or by operation of law. *Chicago, Milwaukee and St. PR Co. v. Clark*, 178 U. S. 353, 20 S. Ct. 924; *Parks v. Inter-State Account Services*, 54 F. Supp. 581; *Charnley v. Sibley* (CCA 7th) 73 F 980.

"Liquidated" means that which can be ascertained by computation or calculation from definite data sup-

plied by evidence and does not lie in mere opinion. *Odessky v. Monterey Wine Co.*, 49 S.E. 2d 330.

“Liquidated” connotes settled; adjusted; determined; fixed; made certain; ascertained; agreed upon by the parties; fixed by operation of law. *In re Davis Mfg., Inc.*, 95 F. Supp. 200, 54 C.J.S., Liquidate, p. 564.

It cannot be said that the claim of the Bank against this Appellant was liquidated. Certainly the Appellant did not acquiesce in the employment by the Bank of its attorney and he did not agree under the terms of the notes, to pay anything other than a reasonable attorney fee.

By the tests outlined in the citations above the Bank’s claim for attorneys fees does not meet the test of “settled”, “adjusted”, “determined”, “fixed”, “made certain”, “ascertained”, “agreed upon by the parties”, or “fixed” by operation of law.

The undisputed testimony of Mr. Bailey and the Appellant show that the Bank had no authority from Appellant to employ an attorney, which want of authority precludes the possibility of privity between Appellant and the Bank in its contract to employ Mr. Johnson.

In the instant case there did exist a claim by the Bank against the Appellant which meets all of the tests of “liquidated.” Under the authorities cited above the Bank had a recognized right to apply the proceeds of the account of this Appellant toward the

payment of Appellant's liquidated debt to the Bank, as represented by the four promissory notes introduced in evidence as Defendant's exhibits 1, 2, 3 and 4; however, though there is a conflict in the authorities, it has been held that a bank is not entitled to apply a deposit to a debt of the depositor which is fully protected by collateral. The decisions supporting this theory hold that the bank must show that the security is inadequate. *Forastiere v. Springfield Inst. for Savings*, 20 NE 2d 950; *Seaboard Finance Co. v. Shire*, 218 P 2d 282; *Zions Savings Bank and Trust Co. v. Rouse et al.*, 47 P. 2d 617; *Ossmen et ux. v. Commercial Credit Corporation*, 241 P. 2d 351.

It would appear that the Bank had, prior to the institution of its foreclosure action (cause #4117) concluded that the security for the promissory notes evidencing the indebtedness of Appellant was adequate, the Bank having elected to foreclose the mortgages securing the notes, rather than by waiving the mortgages and proceeding on the notes.

Each of the promissory notes executed by the Appellant and Jean Kaye in favor of the Appellee Bank contained the following provision" * * * if this note is not paid at maturity and is placed in the hands of an attorney for collection, or suit is brought thereon, to pay all costs of collection, including reasonable attorney's fees. * * *" Had the bank instituted suit on the notes it is doubtful that it could have recovered an attorney fee under the provisions cited without first having introduced evidence as to the reasonable value of the services of the attorney.

It is generally held that attorney's fees can not be allowed where the amount is not stipulated, unless there is proof of the value of the attorney's services. *Getman v. Hayhow*, 229 P. 559, 3 R.C.L. 896, 20 Ann. Cas. 1374 note; *Holland Baking Co. v. Dicks*, 170 P. 253; *Holmes v. S. H. Kress and Co. et al.*, 223 P. 615; *Beindorf v. Thorpe*, 259 P. 242.

Where the amount of the attorney fee is not stipulated the value of such services must be determined by the Court and the burden of proof of value is upon the Plaintiff. 11 C.J. p. 282.

The provision in a promissory note whereby the promisor agrees to indemnify the promisee for attorney fees is limited in amount to such sum as the evidence shows to be reasonable. *Liberty Cent. Trust Co. v. Gilliland Oil Co.*, (D. C. Del. 1923) 289 F. 75.

To sustain the allowance of an attorney fee where the note provides for the payment of attorneys fees if placed in the hands of an attorney for collection, there must be evidence of the value of the services rendered by the attorney. *Mechanics-American National Bank v. Coleman* (1913, CCA 8th) 204 F. 24.

The validity of stipulations in promissory notes for the payment of attorney fees in the event of default has generally been upheld, however, *these provisions are sustained only as an indemnity for the reasonable fees necessarily and properly paid or incurred.*

The question of what constitutes a reasonable fee depends upon circumstances of each case.

To guard against possible oppression and injustice this rule must apply. *U. S. v. Reed*, *U. S. v. Clark*, *U. S. v. Thompson*, *U. S. v. Mowell et al.* (1942) 31 A. 2d 673.

There is much authority to support the proposition that a stipulation in a note to pay a percentage of the debt as an attorney fee is subject to judicial scrutiny to insure reasonableness.

Mechanics-American National Bank v. Coleman (1913, CCA 8th) 204 F 24; *Burns v. Scroggin* (1883, CC) 16 F 734; *Best v. British and A Mtge. Co.* (1897, CC) 79 F 401; *Re Harris* (1921, D.C. Pa.) 272 F 351.

CONCLUSION.

The Appellant contends that the law applicable to the instant case is as follows: A bank may properly apply the funds of a depositor to the payment of a liquidated, matured, and unsecured debt due from the depositor to the bank.

An agreement "to pay all costs of collection including reasonable attorney's fees" is not the basis of a liquidated claim.

Here the Appellee Bank elected to institute mortgage foreclosure proceedings and prior to judgment applied approximately One Thousand Five Hundred (\$1,500.00) Dollars of Appellant's money to the payment of a fee to the Bank's attorney. The holding of

the trial Court taxes the costs of suit against the Appellant prior to a judicial determination of the merit of Appellee's foreclosure action.

Appellee Bank introduced no evidence tending to establish the reasonableness of the attorney fee charged to Appellant. The trial Court did not find that the attorney fee was reasonable (Tr. 36).

A decision of this Court sustaining the judgment upon which this appeal is based would grant judicial sanction and approval to a course of conduct which would ultimately destroy all faith and confidence in public depositories and thereby precipitate the demise of the American commercial system.

Counsel did not find a case in which a bank possessed and exercised such unmitigated gall as to apply all, or practically all, of the funds of a depositor to the employment and payment by way of retainer of an attorney for the bank, the attorney having been employed for the sole purpose of instituting suit to foreclose mortgages on the depositor's property, such mortgages being secured by promissory notes payable to the bank.

By the employment of the methods here adopted any bank could deplete the cash reserves of a depositor and then proceed to seize and sell with judicial sanction and approval, any collateral held by the bank to secure a past due loan. Such practice could be adopted regardless of the amount of money on deposit or the value of the security held by the bank. The

essential ingredients of such a scheme are (1) an unethical banker motivated by greed, avarice, envy, or deceit and (2) an attorney willing to be a party to such chicanery.

The Courts can not in good conscience countenance a situation so fraught with hazards.

Suffice it to say, however, that Appellant does not here imply dishonesty on the part of the Appellee or its attorney, but has merely attempted to point out the perils incident to appellate approval of the law as enunciated by the trial Court.

Respectfully submitted,

GEORGE B. MCNABB, JR.

Attorney for Plaintiff-Appellant.

Service acknowledged by receipt of copy of the foregoing Brief this 24th day of February, 1954.

MAURICE T. JOHNSON—aac,

Attorney for Defendant-Appellee.

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BRIEF FOR APPELLEE.

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FILED

MAY 28 1954

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Defendant-Appellee.

BRIEF FOR APPELLEE.

I.

FACTS.

For the purpose of clarity and brevity, we shall hereafter refer to the plaintiff-appellant as "Kaye" and to the defendant-appellee as "Bank".

Due to the obvious fact that counsel for Kaye went considerably beyond the record in stating the case in his brief, it seems necessary to clarify the fact situation with a brief resume.

Kaye filed his complaint against the Bank on November 7, 1952, wherein he alleged that on the 23rd

day of October, 1952, Kaye had on deposit in the Bank the sum of \$1,480.00 in a special checking account, and that this money was the property of Kaye.

Kaye further alleged that on the 23rd day of October, 1952, the Bank wrongfully and willfully converted and disposed of said sum to its own use, and unlawfully refused to allow Kaye to withdraw the said money from the Bank.

The complaint prayed judgment in the sum of \$1,480.00, together with interest, costs and attorney's fees. (Tr. 3, 4.)

The Bank answered admitting paragraphs I and II of complaint and denying paragraph III. The Bank also included in its answer, two affirmative defenses—first, that the complaint did not state facts sufficient upon which to base a claim against the defendant Bank and, secondly, that the funds deposited by Kaye in the Bank were the property of Kaye and were deposited without instructions and were not a special fund; that at the time of said deposit, Kaye was indebted to the Bank in a sum far in excess of said deposit, and that the said indebtedness was due and owing by Kaye to the Bank at that time, and, therefore, the Bank applied said funds on deposit as a part payment of the indebtedness due the Bank from Kaye. (Tr. 4-6.)

The cause came on for trial on the merits before the Court without a jury on the 8th day of October, 1953.

The testimony produced by Kaye at the trial showed conclusively that at the time the Bank debited Kaye's account for the sum of \$1,480.00, as shown by Plaintiff's Exhibit "A" (Tr. 10, 11) Kaye was indebted to the Bank in a sum in excess of \$12,000.00; that there were no instructions or restrictions on withdrawals against Kaye's account; that the withdrawals included in Plaintiff's Exhibit "A" were for attorney's fees and expenses incurred by the Bank in bringing a suit to foreclose the mortgages securing the indebtedness, and that the notes representing the \$12,000.00 indebtedness by Kaye to the Bank provided that if the note were not paid at maturity and were placed in the hands of an attorney for collection, or suit were brought thereon, the makers of the notes agreed to pay all costs of collection, including a reasonable attorney's fee. (Tr. 25-32, Defendant's Collective Exhibit No. 1.)

The indebtedness evidenced by Defendant's Collective Exhibit No. 1 was due and owing prior to the time the Bank debited Kaye's account.

Kaye, himself, testified that on October 24, 1952, he had an account in the Bank and that this account was charged with the said sum of \$1,480.00. (Tr. 33.) At no time during the testimony did Kaye make any statement that the account was a special one and not subject to regular withdrawals. At no time did Kaye deny being indebted to the Bank far in excess of the amount debited by the Bank.

At the conclusion of the testimony and arguments, the trial Court found in favor of the Bank and against Kaye, and entered findings of fact, conclusions of law, and judgment accordingly. (Tr. 34-39.)

II.

ARGUMENT.

In his statement of points on appeal, Kaye had enumerated three. In his specification of errors in his brief, Kaye has but one point; namely, that the Court erred in that its judgment is contrary to the evidence and contrary to the applicable law. After the statement of this point, Kaye proceeds, in his argument, to quote out of context from opinions and citations and various texts, apparently without ascertaining whether or not the quotations accurately sum up the points involved. Nobody in the whole world knows better than the Appellate Court that sentences out of context rarely mean what they seem to say!

It is well settled that when a depositor is indebted to a Bank, and the debt is mutual—that is, between the same parties in the same right—the Bank may apply the deposit, or such portion thereof as may be necessary, to the payment due it by the depositor, provided there is no express instruction to the contrary and the deposit is not specifically applicable to some other purpose. (7 *Am. Jur.* Sec. 629; *U. S. v. Butterworth-Judson Corporation*, 267 U.S. 387.)

The right of a Bank to apply a depositor's funds held by the Bank to the payment of his indebtedness presupposes: (a) that the funds deposited in the Bank by the depositor were the property of the latter, (b) that the funds were deposited without restrictions and was not a special fund; and (c) an existing indebtedness then due and owing from the depositor to the Bank. Where the right to make such application has accrued, the Bank may do so without notice to the depositor. (*Miche on Banks and Banking*, Volume 5A, 1950 Edition, page 278, Sec. 115(a).)

A complete examination of the record discloses that all of the particular conditions mentioned above, and contained in *Miche on Banks and Banking* were present in the case at bar; thus it is apparent that the question is moot as to the Bank's right to offset Kaye's deposit. *Nelson v. Bank of America National Trust and Savings Association*, 173 P. (2d) 322. See also: *Continental National Bank v. Moore*, 299 F. 270, wherein this Ninth Circuit Court of Appeals held that the right of setoff attaches on money of a customer deposited with a bank in the usual course of business.

Kaye argues that with the suit to foreclose on file, it was incumbent on the Bank to show that the security was inadequate, and cites certain cases, namely, the *Forastiere* case and *Seaboard Finance Company* case on page 10 of his brief to support this argument. However, Kaye overlooks the fact that the general rule in Alaska is that a litigant may pursue as many

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It is well settled that when a depositor is indebted to a Bank, and the debt is mutual—that is, between the same parties in the same right—the Bank may apply the deposit, or such portion thereof as may be necessary, to the payment due it by the depositor, provided there is no express instruction to the contrary and the deposit is not specifically applicable to some other purpose. (7 *Am. Jur.* Sec. 629; *U. S. v. Butterworth-Judson Corporation*, 267 U.S. 387.)

The right of a Bank to apply a depositor's funds held by the Bank to the payment of his indebtedness presupposes: (a) that the funds deposited in the Bank by the depositor were the property of the latter, (b) that the funds were deposited without restrictions and was not a special fund; and (c) an existing indebtedness then due and owing from the depositor to the Bank. Where the right to make such application has accrued, the Bank may do so without notice to the depositor. (*Miche on Banks and Banking*, Volume 5A, 1950 Edition, page 278, Sec. 115(a).)

A complete examination of the record discloses that all of the particular conditions mentioned above, and contained in *Miche on Banks and Banking* were present in the case at bar; thus it is apparent that the question is moot as to the Bank's right to offset Kaye's deposit. *Nelson v. Bank of America National Trust and Savings Association*, 173 P. (2d) 322. See also: *Continental National Bank v. Moore*, 299 F. 270, wherein this Ninth Circuit Court of Appeals held that the right of setoff attaches on money of a customer deposited with a bank in the usual course of business.

Kaye argues that with the suit to foreclose on file, it was incumbent on the Bank to show that the security was inadequate, and cites certain cases, namely, the *Forastiere* case and *Seaboard Finance Company* case on page 10 of his brief to support this argument. However, Kaye overlooks the fact that the general rule in Alaska is that a litigant may pursue as many

remedies as he has, but can have only one recovery. For this reason the *Forastiere* case does not apply, because it turns upon the construction of a Massachusetts statute which is at variance with the concurrent or cumulative remedies rule. (18 *Am. Jur.* Sec. 13, page 136; *Schaffer v. Sellar*, 64 P. (2d) 1334.)

The same situation obtains in the *Seaboard Finance Company* case which was decided upon the express terms of a Utah statute and consequently is inapplicable here. The Utah statute mentioned specifically prohibits offset by the Bank until the security had been exhausted. The applicable Alaska law has no such provision.

On page 11 of his brief, Kaye argues that it is generally held that attorney's fees cannot be allowed where the amount is not stipulated, unless there is proof of the value of the attorney's services, and cites several cases, none of which is applicable here since the Alaska law does not require proof before the trial Court can fix attorney's fees. The *Getman* case, the *Holland Packing Company* case, and the *Holmes* case cited by Kaye on page 11 of his brief all were decided by the Supreme Court of Oklahoma in construing an Oklahoma statute which is different from the Alaska law, and, consequently, these cases have no bearing on the case at bar. The *Beindorf* case also cited by Kaye on page 11 of his brief again was an Oklahoma case in which the Court held that a contract between two parties which did not provide for attorney's fees would not permit the Court to allow fees in an action on the contract. Again we

wish to point out that this is not applicable for two reasons—in the first place the Alaska law is different from the Oklahoma statute, and, secondly, the notes signed by Kaye and admitted in evidence as Bank's Exhibit No. 1 all specifically provide for the payment of attorney's fees in addition to principal and interest.

For some strange reason, Kaye cites "11 C.J. page 282" in the second paragraph on page 11 of his brief. This citation is completely meaningless since it refers to "The Last Clear Chance Doctrine" and obviously was not even checked by Kaye's counsel.

Kaye argues on page 11 of his brief that attorney's fees are limited in amount to such sum as the evidence shows to be reasonable. The question of reasonableness of fees in this case was never presented. At no time did Kaye ever object to the amount of attorney's fees, nor is there any allegation contained in his complaint that the fees are unreasonable, and there was no testimony to the effect that the fees were unreasonable. Therefore, the cases cited by Kaye are inapplicable.

In the conclusion of Kaye's brief, his counsel has resorted to the antiquated and outmoded and shoddy trick of personal vituperation against the Bank and its attorney. Kaye's counsel could well take heed of the admonition given by Joseph Addison when he once said, "It is ridiculous for any man to criticize the works of another if he has not distinguished himself by his own performances."

It is an unbelievable arrogance to suggest that the members of this distinguished Court of Appeals could be misled by such inaccurate interpretation of the facts and the law. It occurs to me that a quotation from an eminent member of the Circuit Court of Appeals for the District of Columbia can well be used to sum up my feeling on the matter: "We can sometimes bear with an amiable knave, but a fool has no place in a profession such as ours."

III.

CONCLUSION.

It is respectfully urged that from all of the facts and circumstances and evidence introduced at the trial, and from all of the law applicable to these facts, it is obvious that the trial Court did not err in finding for the Bank and that the judgment of the trial Court is wholly supported by the law and the evidence, and should be affirmed.

Dated, Fairbanks, Alaska,

May 24, 1954.

Respectfully submitted,

MAURICE T. JOHNSON,

Attorney for Defendant-Appellee.

No. 14,122

IN THE
United States
Court of Appeals
For the Ninth Circuit

WALTER W. JOHNSON COMPANY,
Appellant,

VS.

RECONSTRUCTION FINANCE CORPORATION,
Appellee.

Appellant's Opening Brief

FILED

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No. 14122

IN THE
United States
Court of Appeals
For the Ninth Circuit

WALTER W. JOHNSON COMPANY,	}
<i>Appellant,</i>	
vs.	
RECONSTRUCTION FINANCE CORPORATION,	}
<i>Appellee.</i>	

Appellant's Opening Brief

JURISDICTION

Reconstruction Finance Corporation, plaintiff below, herein referred to as RFC, filed Complaint to Foreclose Indenture and Chattel Mortgage (Tr. 3). It invoked Federal jurisdiction on grounds of the amount in controversy and as arising under the Reconstruction Finance Corporation Act (USCA Title 15, Pars. 601-607) (Tr. 3-4). Defendant and appellant Walter W. Johnson Company, a

Nevada corporation, herein referred to as Johnson, filed its answer to the complaint, which included its counterclaim against RFC (Tr. 74). Jurisdiction on the counterclaim was invoked on the ground of the amount in controversy and on the ground that Johnson was a Nevada corporation, whereas plaintiff was a Federal corporation (Tr. 77). RFC filed its answer to Johnson's counter claim, admitting the jurisdictional allegations (Tr. 91). The jurisdictional facts were also admitted in the Agreed Statement of Facts (Tr. 176).

RFC filed its motion pursuant to Rule 56 for a summary judgment in its favor dismissing each and all the counterclaims asserted by Johnson on the grounds that there was no genuine issue as to any material fact, and that RFC was entitled to have judgment on each and all of said counterclaims as a matter of law (Tr. 173). An Agreed Statement of Certain Facts, Interrogatories and Answers Thereto, Requests for Admissions and Replies Thereto, the deposition of Walter W. Johnson and four affidavits, having been filed, the court below rendered its Memorandum Opinion and Order on Johnson's counterclaim granting plaintiff's motion for a summary judgment dismissing all of Johnson's counterclaims (Tr. 243-274). Thereupon, final judgment on counterclaim was entered (Tr. 275-276) from which this appeal was seasonably taken (Tr. 278).

STATEMENT OF THE CASE

Johnson's counterclaim against RFC alleges substantially as follows: That in the latter part of 1936, RFC passed a resolution declaring its intention to make a loan to Tuolumne Gold Dredging Corporation, a Delaware corporation, herein called Tuolumne, for the purpose of constructing a gold-dredging machine (Tr. 78); that after the passage of such resolution, Tuolumne negotiated with Johnson for the

construction of the gold-dredging machine, and such negotiations were with the knowledge and approval of RFC (Tr. 78); that on May 11, 1937 Tuolumne executed an indenture and chattel mortgage for the benefit of RFC securing the payment of the principal sum of \$600,000 to be used for the purpose of the construction of the dredge and related purposes (Tr. 78) (and see Exhibit A to Complaint—Tr. 17-69); that on the same day, simultaneously with the execution of said mortgage, Tuolumne entered into a contract with Johnson for the construction of the dredge with the approval of RFC (Tr. 78) (and see Exhibit D to Agreed Statement of Facts (Tr. 192) specifying that entire cost of dredge would not exceed \$552,500).

The counterclaim then alleges that Johnson completed construction of the dredge on June 15, 1938, and delivery became complete on September 20, 1938 (Tr. 79-80); that at all times until June 15, 1938, there were ample moneys in the Construction Fund established by said mortgage to pay Johnson the balance due for the construction of the dredge (Tr. 80); that in June, 1938, Tuolumne owed Johnson a balance of \$51,203.99 on the construction of the dredge and the further sum of \$7,815.41 for necessary parts and supplies furnished for the dredge (Tr. 81); that notwithstanding adequate moneys remained to make payment of these obligations from the Construction Fund, Tuolumne and RFC depleted the fund so that on September 24, 1938 there remained only \$40,000 therein, which sum Tuolumne and RFC attempted to compel Johnson to accept in full payment of the balance, but which it refused to accept on such condition (Tr. 81); that upon Johnson's refusal to accept said sum, RFC and Tuolumne expended the money for other purposes (Tr. 81).

Johnson's counterclaim further alleges that it then brought action against Tuolumne in the Superior Court for the moneys so due it (Tr. 81). The counterclaim then briefly describes protracted litigation between Johnson and Tuolumne, both in the State courts and in the Federal court, and alleges that it was not until April, 1949, that it was finally determined that Tuolumne was indebted to Johnson for the items in question (Tr. 81-83).

The counterclaim then alleges that at all times RFC had full and complete knowledge of Johnson's performance of the contract, of the moneys due him, of the balances available to pay Johnson in the Construction Fund, etc. (Tr. 83); that, contrary to the express provisions of the RFC resolution and the provisions of the mortgage, RFC, which had complete control over the Construction Fund, caused the balance therein to be delivered for other purposes without making provision for payment to Johnson (Tr. 84); that RFC improperly advanced moneys to Tuolumne for the purpose of contesting and waging the litigation between Tuolumne and Johnson, and aided and abetted Tuolumne in efforts to defeat recovery by Johnson of the moneys due (Tr. 84); and that Tuolumne was insolvent (Tr. 84).

The first four counts of the counterclaim seek recovery on different theories of the following items:

1. Balance of price of building dredge.....	\$ 51,203.99
2. Tools and supplies.....	7,813.41
3. Interest included in judgment for item 1	5,080.67
4. Interest included in judgment for item 2	712.37
5. Costs in State Courts.....	365.40
6. Interest since judgment in state court....	42,689.25
7. Costs in Federal judgment.....	1,351.80

Total	\$109,216.89
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The fifth count of counterclaim alleges that Johnson paid the State of California \$9,988.47 as sales taxes assessed on the dredge, for which Tuolumne was expressly liable to Johnson, and for which RFC was also liable to Johnson for reasons previously alleged (Tr. 89).

RFC filed its answer to Johnson's counterclaim admitting the making of the notes and mortgage and the making of the construction contract (Tr. 91-2), but denying the dates of completion and final delivery of the dredge (Tr. 93), denying the various balances due to Johnson for construction of the dredge (Tr. 94), denying the allegations regarding the protracted litigation between Johnson and Tuolumne (Tr. 94-5), denying the fact that Johnson obtained final judgment against Tuolumne, (Tr. 95), denying RFC's aiding and abetting the litigation (Tr. 95), denying that Tuolumne was insolvent (Tr. 95), denying that Johnson was damaged by RFC's action (Tr. 95), and denying the allegations regarding payment of sales tax (Tr. 98).

In addition to these denials, RFC set up the California statute of limitations and laches as affirmative defenses (Tr. 98-9).

The factual showing in the lower court consisted of the deposition of Walter W. Johnson consisting of 166 printed pages (Tr. 281-446); an Agreed Statement of Facts covering limited facts and basic documents (Tr. 176-206); Interrogatories addressed by RFC to Johnson (Tr. 100-113) and Answers thereto (Tr. 114-24); Requests for Admissions addressed by RFC to Johnson (Tr. 124-68), and Answers thereto (Tr. 168-72); and four affidavits filed on behalf of Johnson, to wit, those of Walter W. Johnson, Harley Hise, DeLancey C. Smith and William F. Kelly (Tr. 211-242).

The affidavit of Mr. Johnson showed that he and his company had had many years of experience in constructing gold

dredges (Tr. 213); that until he commenced to build gold dredges under RFC financing, he invariably retained legal title to the dredge until his work was completed and the purchase price was paid (Tr. 213); that when the RFC began to finance gold-dredging operations, it initiated the practice of taking a first mortgage on the dredge, and Johnson Company agreed to relinquish the title it normally reserved in the dredge solely upon condition that the RFC financing and the "Construction Fund" which it provided for would unquestionably see that it was paid (Tr. 213); that in three prior instances of building dredges under this method of RFC financing, Johnson Company received full payment from the Construction Fund established under the RFC trust indenture (Tr. 214).

The RFC was well aware of Johnson's attitude and reliance long before the documents were signed in the instant transaction (Tr. 241, 397, 398). Both the RFC Indenture and the Tuolumne-Johnson construction contract were negotiated and drafted in the offices of the RFC in Washington during three-cornered negotiations participated in by the RFC, Johnson and Tuolumne (Tr. 291, 292). Mr. Johnson dealt with Mr. Morton Macartney, overall chief engineer of the RFC, and also head of its Mining Section (Tr. 292) and with Mr. John E. Norton, Chief Engineer of the RFC Mining Section (Tr. 292). The gist of the transaction was that since Tuolumne was without funds or other assets, save for the value of exploratory work it had done, RFC would provide \$600,000 under its Indenture (Tr. 371, 396). The cost of the dredge, \$552,500, would thus be paid entirely out of the Construction Fund (Tr. 371, 396). The RFC prepared a list of the expenditures to be made from the Construction Fund established by the Indenture (Tr. 397-398). Tuolumne planned to raise only \$50,000 apart from the RFC loan (Tr.

396). Johnson was expected to contribute \$10,000 of this \$50,000 (Tr. 371). Tuolumne's \$50,000 was to be added to the Construction Fund, and thus a total of \$650,000 would be subject to RFC control (Tr. 38-39).

Johnson looked to and relied upon the RFC loan for payment of the dredge (Tr. 212, 396-8). Johnson's affidavit states:

“* * * Upon many occasions during the course of preparation of both documents, it was stated by me and agreed to by others present representing RFC that I was looking for payment to Johnson Company of any money which might become due under the contract solely to the proceeds of the loan to be made by RFC and that I would not enter into such a contract for my company unless the loan was made. It was understood by all present and so stated, including to and by representatives of RFC, that Tuolumne did not have sufficient funds to pay for the construction of a dredge unless a loan was made by RFC which would cover the cost of such a dredge.” (Tr. 212-213)

An analysis of the Indenture (Tr. 17-73), together with the construction contract (Tr. 192-206) bears out Johnson's unmistakable reliance upon RFC. The Indenture itself refers to the proposed gold-dredging machine as the “Project” (Tr. 36, 39, 41, et seq.), and contains elaborate provisions as to the manner in which all funds are to be placed in the Construction Fund, over which RFC reserved complete control (Tr. 38, 39, 41). RFC caused payments to be made to the Construction Fund and thence to Johnson Company amounting to \$510,000, to and including May 28, 1938 (Tr. 119-120). After this time, RFC caused no further payments to be made because of a dispute raised by Tuolumne as to its legal obligation to pay Johnson the balance of over \$50,000 claimed to be due for the dredge (Tr. 214). Mr.

Johnson was advised in November, 1938, that Tuolumne had improperly gotten away with \$15,000 of the Construction Fund, but there was a balance of \$40,000 remaining in the fund, which would be paid to Johnson Company as soon as it was proper to do so (Tr. 215). In 1939, Mr. Norton, RFC representative, stated that \$40,000 was still in the fund which would be kept intact and that McDonald, President of Tuolumne, should not have been allowed to get away with \$15,000 of the Construction Fund (Tr. 215).

The excuse given by RFC for not meeting its obligations to Johnson out of the Construction Fund was the lack of finality of litigation between Johnson and Tuolumne which had become extremely complicated (Tr. 216). Even though Johnson obtained judgment against Tuolumne in February, 1940, for \$65,175.84, representing the first five items hereinabove mentioned (*supra*, p. 4) this judgment was not final, and RFC representatives stated that no payment could be made to Johnson Company until the litigation was terminated on an appeal which Tuolumne would take from the judgment (Tr. 216).

The state court litigation is reviewed in *Western Pipe & Steel Co. v. Tuolumne Gold Dredging Corporation*, 63 C.A. (2d) 21 (1944). This litigation began when three actions were filed in the state superior court to enforce individual liens asserted by Johnson's subcontractors against the dredge. Johnson took over the claims of these lien claimants and filed a cross-complaint against Tuolumne for the entire balance due for the dredge, plus the cost of additional tools and supplies. The three actions were consolidated for trial and on February 29, 1940, the superior court entered judgment in favor of Johnson and against Tuolumne for the full amount plus costs and interest to date of judgment. Tuolumne then appealed, asserting numerous technical errors

which allegedly occurred in the trial. The judgment was affirmed March 25, 1944, and petition for hearing by the supreme court was denied April 20, 1944.

In the appellate court's opinion, however, 63 C.A. (2d) 21, at p. 32, reference was made to another action between the same parties, wherein Tuolumne had sued Johnson for alleged defects in constructing the dredge. This suit had been transferred to the federal court, and since it was still pending, the appellate court directed that "until the final determination of the proceeding in the federal court, all proceedings under said cross-complaint against Walter W. Johnson Company, as cross-respondent to said cross-complaint be suspended." Accordingly, Johnson's judgment against Tuolumne in the state court was not then final.

The federal court litigation is reported as follows:

Tuolumne Gold Dredging Corporation v. Walter W. Johnson Company, 61 F. Supp. 62 (D.C. Cal. 1944);
Tuolumne Gold Dredging Corporation v. Walter W. Johnson Company, 71 F. Supp. 111 (D.C. Cal. 1947)

In the first of these decisions, Judge Welsh refused to grant summary judgment in favor of Johnson. In the second decision, however, Judge Lemmon granted Johnson's motion for summary judgment on the ground that the issues raised in the federal court by Tuolumne against Johnson were identical with the issues decided by the State Court as between the same parties. Although Judge Lemmon's decision was dated March 11, 1947, it was not until April, 1949, that Tuolumne abandoned its appeal from Judge Lemmon's decision, so that it was not until this late date that Johnson's judgment against Tuolumne in the state court became final (Tr. 218, 242).

RFC was at all times fully aware of the litigation in both state and federal courts in all its phases (Tr. 242). RFC or its counsel had copies of the pleadings and transcripts in the litigation (Tr. 327, 331). RFC itself advanced funds for the payment of costs, fees and expenses of Tuolumne in the litigation (Tr. 236-7, 242).

While this litigation was pending, Johnson learned not only that the RFC had disbursed the remaining \$40,000 of the Construction Fund (Tr. 412), but had loaned an additional \$120,000 to Tuolumne, secured by second mortgage on the trust property (Tr. 185). It is an admitted fact that RFC thereafter received and applied the proceeds from the operation of the dredge to the repayment of notes secured by this second mortgage of \$120,000, together with interest thereon (Tr. 185). In addition, it is alleged by Johnson (Tr. 88) and denied by RFC (Tr. 97) that RFC appropriated 11 years of earnings of the dredge, and it is a fair inference from the record that such was the fact (Tr. 48, 182-183).

After Johnson learned of RFC's acts in disbursing the balance of the Construction Fund, and in appropriating the proceeds of the operation of the dredge, he again demanded payment from RFC of the moneys due him, but was told that no payment could be made until the litigation with Tuolumne was terminated. His affidavit states:

"Johnson Company obtained judgment against Tuolumne in February, 1940, and a few months later I was in Washington and talked with Mr. Macartney and Mr. Norton and representatives of the legal department of RFC about paying the judgment which had been obtained. Mr. Norton, at that time, stated, in the presence of Mr. Macartney and myself, that no payment could be made to Johnson Company until the litigation was terminated on an appeal which Tuolumne would take from the judgment." (Tr. 215-6)

But Johnson was not content with these excuses and argued that Tuolumne could not possibly succeed on its appeal and that he was entitled to be paid promptly (Tr. 216). This resulted in extended negotiations in which, however, RFC took the position that they were afraid of the political influence of Mr. McDonald, President of Tuolumne, if they paid Johnson before final determination of the litigation (Tr. 217). This was repeated on many occasions between 1941 and 1947 (Tr. 218).

Mr. Johnson states flatly that RFC promised to pay Johnson Company as soon as the Federal court case was finally determined in Johnson's favor (Tr. 123, 219, 417-419). For example, Mr. Johnson's answer to interrogatory 64 states in part:

“* * * among other things stated by Mr. McCartney or his subordinates, it was said that if Johnson Company won the appeal from the State Court decision in Stanislaus County, *RFC would arrange that the balance due Johnson Company under the contract would be paid.*” (Tr. 123) (Italics ours)

And in his affidavit, Mr. Johnson stated:

“* * * Upon many occasions between 1944 and 1947, Mr. Macartney, at the office of RFC at Washington, told me that as soon as the Federal court case was finally determined in our favor, if it was, RFC would arrange to pay Johnson Company.” (Tr. 219)

In addition to the fact that RFC intended and promised to pay Johnson the moneys owing to it upon the termination of the litigation, there is evidence demonstrating a continuing willingness of RFC to negotiate a settlement with Johnson. In September, 1938, the RFC offered Johnson \$40,000 if it would accept that sum in full payment for the balance claimed by it (Tr. 215). After Johnson obtained judgment

in the Superior Court, one of the legal representatives of the RFC recommended that \$65,000 be paid to Johnson (Tr. 217). Still later, in 1947, Johnson's attorney had negotiations with Harley Hise, then a director and later Chairman of the Board of RFC. Mr. Hise conferred with members of the legal staff and received a recommendation from them that the RFC pay Johnson approximately \$65,000 in full settlement of its claims (Tr. 227-228, 238). In October, 1949, after the Federal court litigation ended, Johnson's attorney again conferred with Mr. Harley Hise, at which time negotiations on the basis of a \$75,000 payment were discussed (Tr. 239). However, at that time, the RFC legal representative stated that he would be unable to recommend a settlement (Tr. 239).

During the pendency of the instant case, negotiations were revived. In June 1951, Johnson had plans to sell the dredge to Lehigh Portland Cement Co. for \$225,000, and in this connection RFC formally expressed its willingness to permit Johnson to acquire the dredge at a price which would enable it to receive \$70,723.07 "representing the face amount of your judgment and claim for taxes against Tuolumne" (Tr. 224). When that offer proved unacceptable to Johnson, RFC reduced the price of the dredge so that Johnson could have realized approximately \$90,000 in payment of its counterclaims (Tr. 226). Unfortunately the proposed transaction collapsed because of RFC's delays in acting on Johnson's proposals (Tr. 220).

Although the negotiations came to naught, they show RFC's continuous recognition of its liability, and Johnson's reliance on the many assurances he received through the years that he would be paid when the Tuolumne litigation ended.

There is not one iota of "evidence" to show that RFC ever at any time intended to assert or rely upon the statute of limitations or laches as a bar to Johnson's claim. To the contrary, the record clearly shows requests that Johnson not press his claim until the litigation ended (Tr. 419). In this connection, Johnson testified:

"* * * and he (Macartney) said, 'We have no question but what we could meet McDonald in a law suit but,' he said, 'there is a lot of politics enter into this.' *And he was quite urgent asking me to not press the matter until after our case had been decided.*" (Tr. 419) (Italics ours)

From the foregoing, it will be realized that Johnson's claims against RFC are founded upon a broad factual background which began prior to the execution of the 1937 Indenture and continued until as late as 1951, which was the last time RFC recognized its obligation to see that Johnson was paid.

It cannot be the law that when a money lender establishes a trust fund for the purpose of paying a building contractor, and retains complete control over the trust fund, and the building contractor relies upon the trust fund for payment, the lender can later divert the fund to other purposes with impunity. Nor can it be good law that, after the lender diverts such fund, but continues to admit his liability, subject to a dispute between owner and builder as to the balance due, the lender can assert limitations or laches if, when such dispute is settled, the building contractor promptly sues the lender.

These principles do not arise exclusively from the terms of the indenture between the lender and the owner. In the instant case, the indenture was merely a part of the long and continuous relationship between Johnson and RFC.

It is our contention that this factual background involved genuine issues of fact, and that Johnson was entitled to a full trial on the merits and should not have been denied this fundamental right through summary judgment procedure.

No one realized the importance of this factual background more clearly than opposing counsel, who in the early stages of the instant case, not only raised numerous issues of fact, but thereafter took Mr. Johnson's deposition and directed numerous interrogatories to him on the very questions which they now must claim were not "genuine issues of fact."

In taking Mr. Johnson's deposition, counsel devoted approximately 140 pages of the printed transcript (Tr. 283-422) to the most detailed inquiry into Johnson's negotiations and relations with the RFC and its many representatives. Again in counsel's interrogatories many questions were asked as to promises and representations by representatives of the RFC as to payments of the amounts claimed by Johnson (Tr. 100-113). An excellent example of counsel's interest in the facts is brought out by the questions and answers to interrogatories 63 and 64 which we quote in full:

"63. Q. State whether RFC or any representative thereof at any time requested Johnson Company not to institute legal action against RFC or to delay instituting legal action against RFC."

"A. Yes."

"64. Q. If the answer to question 63 is in the affirmative, and if such request or requests were oral, state with respect to each such request the time, place, persons present, person who made any request, and person to whom any request was made."

"A. Upon many occasions Mr. McCartney and others connected with his Department at RFC made this request, the exact dates and times and persons present, not being within the present memory of John-

son Company. Among other things stated by Mr. McCartney or his subordinates, it was said that if Johnson Company won the appeal from the State Court decision in Stanislaus County, RFC would arrange that the balance due Johnson Company under the contract would be paid. This statement was made many times between 1940 and 1947 by Mr. McCartney and others connected with RFC. It was also said several times, at similar conversations, that RFC was afraid of Mr. McDonald's political influence, or they would arrange to pay without an appeal." (Tr. 112, 123.)

It seems plainly inconsistent, we think, for counsel thus to embark upon the most detailed factual inquiry, and then to urge upon the court that the present case involves "no genuine issue as to any material fact." And it is even more strange that opposing counsel, having drawn from Mr. Johnson the extensive factual background of the transaction, would not see fit to controvert his deposition and affidavits by producing any statement from the RFC officials named by Johnson.

We will shortly point out that the court below, in its memorandum opinion, wholly ignored this factual background.

The single issue before this court is whether the summary judgment was improperly granted inasmuch as there were one or more genuine issues as to a material fact.

We frankly cannot see how this court can fail to hold that the present case is essentially a "fact" case, and that Johnson was entitled to his day in court, and having been denied it, is entitled to a reversal of the summary judgment.

SPECIFICATION OF ERRORS

I. The court below erred by failing to observe the limited scope of a motion for summary judgment. The court's duty was to ascertain whether there were genuine issues as to any material facts, but the court made no attempt to determine this question, and ignoring triable issues, purported to grant judgment "on the merits."

II. The court below erred in holding that Johnson's first cause of counterclaim was barred by limitations. The court ignored evidence clearly showing that the RFC had waived the statute and that it did not begin to run until 1949.

III. The court erred in holding that Johnson had no lien, or if it did that the lien was barred by limitations. In both these respects the court ignored plain and substantial issues of fact.

IV. The court erred in holding that RFC was not unjustly enriched and in ignoring issues of material fact bearing upon the claim of unjust enrichment.

V. The court erred in holding that RFC was entitled to appropriate the proceeds of operating the dredge while Johnson remained unpaid for it. The court failed to consider whether such appropriation constituted a constructive fraud and converted RFC into a constructive trustee.

VI. The court erred in holding that RFC was not liable for payment of sales taxes, since there was a genuine issue of fact on which such liability was predicated.

THE COURT BELOW ERRED BY FAILING TO OBSERVE THE LIMITED SCOPE OF A MOTION FOR SUMMARY JUDGMENT. THE COURT'S DUTY WAS TO ASCERTAIN WHETHER THERE WERE GENUINE ISSUES AS TO ANY MATERIAL FACTS, BUT THE COURT MADE NO ATTEMPT TO DETERMINE THIS QUESTION, AND IGNORING TRIABLE ISSUES, PURPORTED TO GRANT JUDGMENT "ON THE MERITS."

We earnestly believe that the court below misconceived the limited scope of its duties in passing upon the motion for summary judgment. Rule 56c permits the granting of summary judgment only if it is determined that there is no genuine issue as to any material fact. The inquiry on the motion relates to the question whether any such genuine issue exists, not to the weight of evidence bearing upon any issue. If it is determined that one or more such genuine issues exist, there must be a trial on the merits.

As Judge Hutcheson said in *Whitaker v. Coleman*, 115 F. 2d 305, (CCA 5 1940):

“* * * Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.”

Let us turn now to Judge Lemmon's memorandum opinion (Tr. 244-274) and see whether he endeavored to “carefully test out” whether Johnson “really had evidence which he would offer on a trial.”

Paragraph 1 of his opinion refers to the Agreed Statement of Facts. This deals almost entirely with the Inden-

ture, the construction contract, the second mortgage, later advances and the status of payments, etc. (Tr. 245-251). It should be clearly understood that this "Agreed Statement of Facts" did not purport to be a complete statement of the whole case, nor was there any stipulation submitting the case for decision on this "Agreed Statement." To the contrary, the motion for summary judgment is in the customary form required by Rule 56, which in turn provides that summary judgment may be rendered:

"* * * if the pleadings, *depositions*, and admissions on file, *together with the affidavits*, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Accordingly, if Judge Lemmon conceived that the whole case was submitted on the Agreed Statement, he was mistaken, and that cannot excuse his failure to consider the affidavits, depositions, etc.

Paragraph 2 of the opinion contains a slight indication that the court may have intended to confine its opinion to the Agreed Statement of Facts. Thus, the court says, at page 251:

"In the Court's view of the issues, and in the light of the Agreed Statement of Facts and the factual recitals contained in the above-mentioned reported decisions, only a brief summary of the present pleadings is here required."

However, the court then proceeds to state that although RFC filed alternative motions, only the motion for summary judgment need be considered (Tr. 252).

In paragraph 3 of its opinion the court holds that the six-year statute of limitations applicable to claims against the United States would apply to claims against RFC (Tr.

253-257). While we think the court erroneously placed RFC on the same footing with the United States, we will not pursue the point here.

In paragraph 4, the court refers to "conflicting views as to when the statute of limitations commenced to run." (Tr. 257) The court then states that these conflicting views "will be evaluated" but does not at this point, or at any other time, refer to the issue of waiver and estoppel to assert limitations.

In paragraph 5, the court holds flatly that whatever right Johnson had to file suit as a third-party beneficiary accrued on September 24, 1938, and was barred (Tr. 260-263). No reference is made here, or elsewhere, to the extensive evidence we have referred to above showing that RFC recognized its obligation to pay, stated that it would pay after the litigation was ended, negotiated to pay the amounts Johnson claimed, and therefore waived and is estopped to assert the statute of limitations.

In paragraph 6, the court holds that if Johnson had a lien, it was extinguished by limitations. The court pays no attention to the facts and circumstances surrounding the 1937 transaction; the court does not consider the crucial question of *intent* to see that Johnson was paid exclusively from the Construction Fund; and as to limitations, the court again applies the Federal statute of limitations to any lien which could have arisen, without considering an issue as to waiver or estoppel.

In paragraph 7, the court holds that "the record contains no suggestion of unjust enrichment attributable to the plaintiff" (Tr. 265-271). In this holding, however, the court itself takes two positions inconsistent with its holding. In the first place, it admitted it was in such doubt as to the extent of Johnson's claims of unjust enrichment that on May

22, 1953, it addressed a letter to both counsel asking whether it was Johnson's intent to rely on any claim other than that alleged to have arisen out of the application of the proceeds from the operation of the dredge to the satisfaction of the second mortgage (Tr. 267). Not having received a satisfactory reply from Johnson's counsel, the court declined to grant Johnson additional time within which to reply. In its own words "in view of the unclear state of the record on the limitations aspect of Johnson's third cause of counterclaim, the court will consider the latter *on its merits*." (Tr. 268) Clearly a genuine issue of fact existed as to the extent of the appropriations by RFC of the operations of the dredge. Yet the court, without a trial, and without having given Johnson the opportunity to clarify the point, purported to decide it against Johnson "on the merits." Then as a second inconsistency the court said (Tr. 270):

"The crucial question remains: Was this enrichment 'unjust'?"

The opinion then states that "Johnson has completely failed to establish 'unjust enrichment' on the plaintiff's part" (Tr. 271). How could the court possibly decide the question of "injustice" of the admitted "enrichment" without hearing the facts? By its very nature, such a question would involve all the facts and circumstances under which the enrichment was obtained. The court erroneously said that since Johnson had not "established" these facts, he must lose. We say it is fundamental that he should not have lost without at least having had his day in court.

In paragraph 8 which again deals with unjust enrichment, the court says that it "has likewise *weighed* this fourth counterclaim *on the merits*" (Tr. 272). The court then holds that "there is absolutely nothing in the record to

support a charge of dishonesty on the part of the plaintiff.” But all of Johnson’s showing raised such serious questions of the propriety of RFC’s conduct as to suggest violation of a constructive trust. What more should Johnson have put in the record on summary judgment proceedings?

Lastly, the court summarizes its opinion by stating that the claims of unjust enrichment and fraud “are clearly without foundation *on the merits*. The record discloses neither overreaching nor dishonesty on the plaintiff’s part.” (Tr. 274) Once again we say, the court’s reference to “the record” appears to assume that there was a *record on the merits*. But there having been no trial, there was no such record.

Now, having in mind the facts summarized earlier in this brief, let us ask this court whether Judge Lemmon determined whether a genuine issue of fact existed on any of the following issues. That it was the *intent* of all concerned in the 1936-1937 negotiations that Johnson should be paid in full out of the Construction Fund? That Johnson relied on the Construction Fund as the sole source of payment? That RFC wrongfully disbursed the Construction Fund in violation of Johnson’s rights? That RFC nevertheless promised and represented it would pay Johnson? That the reason it gave for not paying it was that the litigation between Johnson and Tuolumne had not become final? That RFC requested Johnson not to press its claim against RFC until that litigation ended? That RFC negotiated for a settlement with Johnson on such basis? That Johnson relied on these negotiations as a waiver of and estoppel to assert the statute of limitations? That a relationship of trust and confidence existed between Johnson and RFC so that the latter became a constructive trustee of all funds in the Construction Fund or of the earnings? That RFC’s appro-

priation of the earnings from operations and its uses thereof, under all the circumstances, made this admitted enrichment unjust? That throughout the entire negotiations between the RFC and Johnson, the former's conduct was such as to estop it from asserting a first lien on the dredge and the proceeds of operation therefrom? That, in view of the foregoing unanswered issues, the time when the statute of limitations began to run was also a genuine issue of fact?

There is not one word in the trial court's opinion which mentions these issues of fact. There is no express reason given by the court below for denying a trial on the merits on these issues.

The authorities show that the court fell into the common error of misconceiving its limited powers and duties on motion for summary judgment. In *Whitaker v. Coleman*, supra, an insurance company invoked summary judgment procedure, although there was a question whether the driver of an automobile was an "insured." The insurance company prevailed in the court below, but the appellate court recognized the existence of a genuine issue of fact on the point and reversed the summary judgment, saying:

"* * * The invoked procedure, valuable as it is for striking through sham claims and defences which stand in the way of a direct approach to the truth of a case, was not intended to, it cannot deprive a litigant of, or at all encroach upon, his right to a jury trial.

"Judges in giving its flexible provisions effect must do so with this essential limitation constantly in mind. To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force."

The *Whitaker* case, supra, was cited in the leading United States Supreme Court case interpreting Rule 56, viz.:

Sartor v. Arkansas Gas Corp., 321 U.S. 620, 88 L. Ed. 967 (1944).

In that case, the gas company moved for summary judgment on the ground that no genuine issue of fact existed whether the price of natural gas exceeded 3¢, and in this behalf presented numerous lengthy affidavits of supposed authorities on the subject. The plaintiff landowner merely filed the affidavit of its counsel setting forth the history of previous litigation, etc. The trial court and the circuit court of appeals both held that defendant was entitled to the summary judgment, but this holding was reversed on the ground that defendant could not thus deprive plaintiff of its day in court, no matter how much the weight of evidence appeared to be against it. The court said, per Justice Jackson:

“It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner. The judgment accordingly is reversed.”

Just so, in the instant case, Johnson should not have been deprived of his day in court and his right to cross-examine the RFC officials who promised that he would be paid.

In the recent case of *Pacific American Fisheries v. Mullaney*, 191 F. 2d 137, (1951 CCA 9) plaintiff sought an injunction against the enforcement of a 1949 Alaskan statute imposing a tax on nonresident fishermen. The trial court

ordered summary judgment for the defendant Commissioner. This court reversed the judgment on the ground that plaintiff should have been allowed a trial on the merits, and particularly to offer evidence on a disputed issue of fact. The court further said:

“Because of the importance of the issues presented in this statute, we think it was not one to be disposed of by summary judgment even if proper motions for such judgment had been made or proper opportunity afforded for appropriate showing by affidavit or otherwise.”

In several cases decided by the Circuit Court of Appeals for the Second Circuit, the judges have warned of the exceedingly limited nature of the summary judgment procedure: Thus in

Doehler Metal Furniture Co. v. United States, 149 F. 2d 130, 135-136 (CCA 2-1945)

Judge Frank said:

“We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy, time-saving device. But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the principal purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay * * * The District Courts would do well to note that time has often been lost by reversals of summary judgment improperly entered (citing cases)”

And in *Colby v. Klunc*, 178 F. 2d 872 (CCA 2-1949) Judge Frank said:

“We have in this case one more regrettable instance of an effort to save time by an improper reversion to ‘trial by affidavit,’ improper because there is involved an issue of fact, turning on credibility. Trial on oral testimony, with the opportunity to examine and cross-examine witnesses in open court, has often been acclaimed as one of the persistent, distinctive, and most valuable features of the common-law system. For only in such a trial can the trier of the facts (trial judge or jury) observe the witnesses’ demeanor; and that demeanor—absent, of course, when trial is by affidavit or deposition—is recognized as an important clue to witness’ credibility. When, then, as here, the ascertainment (as near as may be) of the facts of a case turns on credibility, a triable issue of fact exists, and the granting of a summary judgment is error.”

In a case quite similar on its facts to the instant case, (*Begnaud v. White*, 170 Fed. 2d 323) the Court of Appeals for the Sixth Circuit said:

“The authorities indicate that the trial judge should be slow in passing upon a motion for summary judgment which would deprive a party of his right to a trial by jury where there is a reasonable indication that a material fact is in dispute. Compare *Sartor v. Arkansas Gas Corp.*, 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967, where the affidavits of eight witnesses on behalf of the defendant were, under the circumstances in that case, insufficient to authorize the Court to sustain defendant’s motion for summary judgment.”

In our own state, the California Supreme Court in *Eagle Oil & Refining Co. v. Prentice*, (19 C. 2d 553, 1942) has commented thus on summary judgments:

“The issue to be determined by the trial court in consideration of a motion thereunder is whether or not defendant has presented any facts which give rise to

a triable issue or defense, and not to pass upon or determine the issue itself, that is, the true facts in the case * * * If that were not true, controversial issues of fact would be tried upon affidavits by the court and not a jury. Because the procedure is summary and presented on affidavits without the benefit of cross-examination, a trial by jury and opportunity to observe the demeanor of witnesses in giving their testimony, the affidavits filed on behalf of the defendant should be liberally construed to the end that he will not be summarily deprived of the full hearing available at a trial of the action and the rights incident thereto.

The procedure is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact." (p. 555)

In his excellent article in *40 California Law Review*, page 204, on "Summary Judgment Under Federal Practice," Judge Yankwich points out that the Circuit Courts of Appeal have declined to allow District Judges to weigh conflicting evidence in passing on motions for summary judgment, saying:

"The fear in Anglo-American jurisprudence of 'Trial by Affidavits' may be the motivation behind this, and the feeling that such trial contravenes the right to have matters of fact decided by jury under the constitutional guaranty." (*40 Cal. Law Rev. P. 224*)

And further, Judge Yankwich concludes:

"Trial judges, especially those in metropolitan areas, confronted with ever increasing litigation, have shown eagerness to use this method of weeding out unmeritorious claims and defenses. At times, they have been restrained by warnings of the courts of appeal. Which brings us back to the fact that absolute simplicity is as illusory and difficult of attainment in procedure as it

is in life. In a complex world, litigation will reflect complexity. Procedural reform may help achieve quick disposition of litigation at times. But the complexity inherent in the material out of which certain litigation arises, the litigious character of the American people, especially of the people of the West, the scrupulous determination of higher courts to have facts determined upon full trial, stand in the way of substituting even so desirable a reform as summary judgment for the average trial. Slow as the judicial process may be at times, I am convinced that peace under law, which is the real object of a lawsuit, can best be achieved by a full-scaled airing of complicated controversies. Summary judgment may achieve limited ends. But if, through a more universal use, it achieved greater immediate objectives, the result might in the long run, be harmful to the democratic process."

See also

Bozant v. Bank of New York, 156 F. (2d) 878 (CCA 2, 1946);

48 Columbia Law Review 780 (1948);

51 Michigan Law Review 1143 (1953).

In conclusion, we respectfully and earnestly submit that Judge Lemmon's opinion shows on its face that he misconceived the function of summary-judgment procedure. The opinion fairly indicates that the court made no effort whatever to ascertain whether any genuine issue of fact existed. The court went even so far as to purport to dispose of entire causes of action "on the merits." The court wholly ignored the extensive factual background of Johnson's claims. The court fell into the error so frequently pointed out by circuit courts of appeals, as well as by the United States Supreme Court, of denying a litigant the right to a

trial on the merits. Johnson had the right to a day in court; to present its case in person to a trier of fact; and to confront its adversaries in open court with cross-examination. Johnson was denied these fundamental rights. Accordingly, the summary judgment should be reversed.

II.

THE COURT BELOW ERRED IN HOLDING THAT JOHNSON'S FIRST CAUSE OF COUNTERCLAIM WAS BARRED BY LIMITATIONS. THE COURT IGNORED EVIDENCE CLEARLY SHOWING THAT THE RFC HAD WAIVED THE STATUTE AND THAT IT DID NOT BEGIN TO RUN UNTIL 1949.

The court below held that, assuming Johnson was a third-party beneficiary of the RFC-Tuolumne contract, then its cause of action must have accrued on September 24, 1938, when RFC diverted the balance in the Construction Fund to other purposes,¹ and accordingly that the six-year statute of limitations on claims against the United States barred Johnson's claim in September, 1944 (Tr. 261).

We contend that the RFC waived and was estopped to assert the statute of limitations, and we refer to the extensive evidence heretofore summarized, wherein it was shown that RFC stated that Johnson's claim would be paid after the litigation ended, and urged Johnson not to press its claim until such time, and led Johnson to believe that its claim would inevitably be settled (supra pp. 8-15).

All that we need to do is to convince this court that there was a genuine issue of fact on this point of waiver and estoppel. If there was, there is nothing that this court can do

1. We believe the court erred in stating that the Construction Fund became wholly exhausted on September 24, 1938. The record shows that the last \$40,000 was paid into the fund on that date, but does not show when the balance in the fund became wholly exhausted.

but to reverse the summary judgment, and send the case back for trial.

Fortunately, we are able to refer to a case which is very similar on its facts to the instant case. In

Begnaud v White, 170 F. 2d 323 (CCA 6-1948)

plaintiff, Commissioner of Banks, sued in 1947 for the unpaid balance of a promissory note dated November 1, 1930. Defendant moved for a summary judgment on the ground that the action was barred by the six-year Tennessee statute of limitations. Affidavits showed that the bar of the statute had been expressly waived from time to time until February 15, 1947. Just before the later date, negotiations took place for a settlement. During the course of these negotiations plaintiff allowed February 15, 1947, to pass by without obtaining a further written extension of the statute. As soon as the date passed, defendant stood on the statute. Plaintiff at first claimed that its failure to obtain an extension was due to inadvertence in its bookkeeping department. This ground would obviously have been insufficient to estop the defendant. Thereafter, however, plaintiff showed through affidavits filed in opposition to the motion for summary judgment that it refrained from filing suit within the statutory period through reliance upon the statement and conduct of the defendant during the negotiations to the effect that he would not raise the statute of limitations. The appellate court held that this showing created a genuine issue as to a material fact, saying:

“* * * Whether the jury would accept such testimony at its face value or reject it is not the present question. Taking it at its face value on the motion for summary judgment, it clearly puts in sharp issue the defendant’s claim that the bank’s liquidators did not rely upon the representations and negotiations of White.” (*Begnaud v. White*, 170 F. 2d 323, 327).

About the only difference between the above case and the case at bar is that the facts in our case are much stronger. In the cited case, the court said that notwithstanding plaintiff's weak factual showing, those facts had to be taken at face value, and, therefore, entitled the plaintiff to a trial. In our case, we have a wealth of evidence concerning RFC's waiver, its express promises to pay at a later time, and its request that Johnson not press the claim until later. There is no question that these convincing facts created a genuine issue, and it would be grossly unjust to deny Johnson a full trial thereon.

The fact is that the court below did not even consider the doctrine of waiver and equitable estoppel, nor touch upon the evidence directed to this issue. This illustrates further our contention that the court misconceived the limited scope of his powers in passing upon the motion.

In *Adams v. California Mutual B. & L. Association*, 18 C. (2d), 487 (1941), the question arose whether the California Building and Loan Commissioner—a public official—was equitably estopped to assert the statute of limitations in view of the fact that he had assured claimants that payment of their claims would depend on the outcome of other litigation. The court said:

“The actions here involved are not barred by laches or the running of the statute of limitations. There is uncontradicted evidence in the record that the office of the defendant Building and Loan Commissioner continuously indicated and represented, verbally and in writing, that the decision in the Martin case, which was first instituted and in which pursuant to agreement with him the issues were so framed as to cover the several types of investment here involved, should be determinative of the rights of all persons or groups similarly situated; and that it was in reliance on such rep-

representations that these suits were not earlier instituted. Throughout that litigation, as the commissioner paid liquidating dividends to investment certificate holders, he would set aside a proportionate amount to be paid to all 'shareholders' should they be classed in that litigation as creditors entitled to parity with investment certificate holders. *Under all of the circumstances, the commissioner is estopped to plead laches or the statute of limitations.* It is well settled that a person by his conduct may be estopped to rely upon these defenses. (*Rapp v. Rapp*, 218 Cal. 505, 509 (24 Pac. (2d) 161); *Calistoga Nat. Bank v. Calistoga Vineyard Co.*, 7 Cal. App. (2d) 65, 72 (46 Pac. (2d) 246); 16 Cal. Jr. 575; 130 A.L.R. 8.) Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense. (*Rapp v. Rapp*, supra; *Miles v. Bank of America N. T. & S. Assn.*, 17 Cal. App. (2d) 389, 398 (62 Pac. (2d) 177).) These principles have been applied to hold a defendant estopped to plead the statute where he represented that he would be bound by the outcome of a pending suit. (*Missouri, K. & T. Ry. Co. v. Pratt*, 73 Kan. 210 (85 Pac. 141); *Daniel v. Edgecombe County* 74 N. C. 494, 130 A. L. R. 8, 60). Plaintiff's actions here were seasonably instituted upon discovery of the commissioner's change of attitude as regards the effect of the Martin litigation upon the rights of other investors in the association." (Emphasis added) (*Adams v. California Mutual B. & L. Association*, 18 C. (2d) 487 (1941)).

To the same effect, see the following recent cases:

Benner v. I. A. C. 26 C. (2d) 346 (1945);

Berkey v. Halm, 101 C. A. (2d) 62 (1950);

Industrial Indemnity Co. v. I. A. C., 115 C. A. (2d) 684.

Another California case of special interest is

Bollinger v. National Fire Insurance Co., 25 C. (2d)
399 (1944)

where the defendant insurance company procured the dismissal of a previous action on the ground it was premature, and then sought dismissal of a second action on the ground that it was barred by limitations. The supreme court of California said, per Justice Traynor:

“Under the circumstances it would be a perversion of the policy of the statute of limitation to deny a trial on the merits. As the Supreme Court of the United States declared in *Order of R. Telegraphers v. Railway Exp. Agency* (1944), 321 U. S. 342, 348 (64 S. Ct. 582, 88 L. Ed. 788), ‘Statutes of limitation * * * in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put an adversary on notice to defend within the period of limitation and the right to be free of stale claims in time comes to prevail over the right to prosecute them. Here, while the litigation shows no evidence of reckless haste on the part of either party, it cannot be said that the claims were not timely pursued.’ (See, also, 190 Law Times 303-5). (p. 407)

* * * * *

“* * * Statutes of limitations are not so rigid as they are sometimes regarded. Under certain circumstances property rights or immunities may be acquired as a result of the running of the statutory period, but the period will be extended or tolled by the occurrence of certain events, which may be the subject of conflicting evidence, such as absence from the state or disability. (Code Civ. Proc., Sec. 351 et seq.) It is established that

the running of the statute of limitations may be suspended by causes not mentioned in the statute itself. (*Braun v. Sauerwein*, 10 Wall. (77 U. S.) 218, 223 (19 L. Ed. 895); *Collins v. Woodworth*, 109 F. 2d 628, 629.) It is settled in this state that fraudulent concealment by the defendant of the facts upon which a cause of action is based (*Kimball v. Pacific Gas & Elec. Co.*, 220 Cal. 203 (30 P. 2d 39)) or mistake as to the facts constituting the cause of action (*Davis etc. Co. v. Advance etc. Works, Inc.*, 38 Cal. App. 2d 270 (100 P. 2d 1067); see 16 Cal. Jur. 505) will prevent the running of the period until discovery. Principles of equity and justice, which moved this court in the Kimball case, supra, to grant relief are likewise controlling here. There is no need to make fine distinctions as to the persons who owe a duty to disclose. The Kimball case involved an employer whose fiduciary obligations to his employees were uncertain. The present case involves an insurer whose duty of good faith in dealing with the insured is well established. (See 13 *Appleman, Insurance Law and Practice* 36; *Vance, Insurance* (1930) 74.)" (p. 411).

The RFC is not immune from the doctrine of equitable estoppel. It has been repeatedly held that although the RFC is an agency of the Government, Congress has not endowed it with governmental immunity, and it is subject substantially to the same duties and obligations in the courts as is a private litigant.

RFC v. J. G. Menihan Corp. 312 U.S. 81, 85 L. Ed. 595 (1941);

Keifer & Keifer v. RFC, 306 U.S. 381, 83 L. Ed. 784 (1939);

RFC v. Childress, 186 F. (2d) 698 (CCA 8)—1950);

U. S. v. Shofner Iron & Steel Works, 71 F. Supp. 161 (D.C., Ore.) (1947).

Indeed it has been held that the United States itself may be estopped in the same manner as a private party would be estopped where it is acting in a proprietary capacity. Thus, in *United States v. Denver and RGW R. Co.*, 16 Fed. (2d) 374 (CCA 8, 1926), the United States sued in equity for forfeiture of a grant of public lands, but the court held that the Government was estopped from the assertion of its claims. The court said:

“The equitable claims of the state or of the United States are no stronger than those of an individual under like circumstances, and a state or the United States may waive a claim and be estopped from the assertion of a claim under circumstances that would estop an individual from the assertion of a similar claim. *State of Iowa v. Carr* (C.C.A.) 191 F. 257, 266; *United States v. Chandler-Dunbar Water Power Co.* (C.C.A.) 152 F. 25, 41; *United States v. Debell* (C.C.A.) 227 F. 775, 779; *Rannels v. Rowe* (C.C.A.) 145 F. 296, 301; 1 Pom. Eq. Jur. sec. 451.” (*U. S. v. Denver RGW R. Co.*, 16 F. 2d 374, 376, 77).

See also:

Dayton Airplane Co. v. U. S. 21 F. (2d) 673 (CCA 6th, 1927);

Branch Banking & Trust Co. v. United States, 98 Fed. Sup. 757 (Ct. Cl. 1951);

The Falcon, 19 F. 2d 1009 (D.C. Md. 1927).

We submit that the doctrine of estoppel is plainly applicable to the instant case. We have shown that in *Begnaud v. White*, supra, it was held on a similar set of facts that the mere assertion by a defendant that he relied on pending negotiations as an estoppel to assert the statute of limitations was sufficient to entitle him to a trial on the merits. We have shown by *Adams v. California Mutual B. & L.*

Association, supra, that a public official of California was equitably estopped to assert the statute of limitations.

We have shown by an abundance of evidence that the RFC waived and was estopped to assert the statute of limitations. It would be a gross injustice to permit the RFC to escape liability in the face of this evidence. In any event, Johnson was entitled to his day in court. There is no substantial basis for denying that a genuine issue of fact was raised on this point. The judgment should, therefore, be reversed on this ground alone.

Before concluding this section of our brief, it should be pointed out that there are at least two important additional grounds on which the court below should not have barred Johnson's claim on the ground of limitations. One of these grounds is that, by its very act in commencing the present action to foreclose its mortgage and by naming Johnson as a defendant in the action, the RFC necessarily waived limitations as to any claims which Johnson had against it arising out of the same transaction. We believe this point is well taken on the authority of

United States v. Capital Transit Co., 108 F. Supp. 348 (D.C. D.C. 1952);

Kimberly-Clark Co. v. Patten Paper Co., 140 N.W. 1066 (Sup. Ct. Wis. 1913);

Bargo v. Bargo, 86 S.W. 525 (Ct. of App. Ken. 1905);

Cannon Livestock Co. v. Fisher, 255 P. 996 (S. Ct. Ariz. 1927);

Mazurk v. Murawska, 78 N.E. 2d 817 (Ill. App. 1948);

Merrill v. Merrill, 215 Ill. App. 602 (1919).

The second additional ground involves conflicting views as to when the statute began to run. It is our contention that, by its practical conduct and attitude toward Johnson,

RFC was in effect a guarantor of collectibility of Johnson's claim at least to the extent that the Construction Fund would have paid such claim had it not been wrongfully depleted. The liability of such a guarantor does not begin to run until the creditor has exhausted his remedies against the debtor.

Swank v. Mortgage Investment Co. of El Paso, Texas, 83 F.2d 868 (CCA 5, 1936);

Citizens Bank v. Seaboard Surety Corp., 4 CA 2d 766 (1935);

Menefee v. Robert A. Klein & Co., 121 CA 294 (1932).

Upon each and all of the grounds hereinabove mentioned, we submit that the court grossly erred in holding that Johnson's claims were barred by limitations.

III.

THE COURT BELOW ERRED IN HOLDING THAT JOHNSON HAD NO LIEN ON THE PROPERTY OF TUOLUMNE, OR IF IT DID THAT THE LIEN WAS BARRED BY LIMITATIONS. IN BOTH THESE RESPECTS, THE COURT IGNORED PLAIN AND SUBSTANTIAL ISSUES OF FACT.

A. Although a contractor waives a lien to secure payment of costs of construction in favor of a lender whose loan is secured by a first mortgage on the property constructed, to the extent that any portion of the loan fund has not been advanced, the unpaid contractor has a first lien on the property.

The court below rejected Johnson's second cause of counterclaim on the merits as follows:

"To recapitulate, then, Johnson's novel claim of a 'vendor's lien' is to be rejected for the following reasons:

1. In the chattel mortgage, Tuolumne warranted

that it was the owner of the property involved, "free and clear of all liens"; and in the Agreement between Tuolumne and Johnson, the parties declared themselves bound by the chattel mortgage, insofar as it relates to the work undertaken or the payments. * * *

"Accordingly, the Court holds that Johnson has failed to relieve itself of the effect of its admitted surrender of the vendor's lien * * *". (Tr. 265)

It is apparent that the court did not perceive the basis of Johnson's claim on this score; certainly that basis was not discussed in the opinion.

Johnson does not claim a "vendor's lien" or a common law lien based upon possession. Neither does Johnson ground his case upon a mechanic's or other statutory lien or contend that such a lien is normally senior to the first mortgage which patently provides to the contrary. Johnson waived all liens.

This cause of counterclaim, like the balance of Johnson's case, except for the first cause of counterclaim, sounds in equity. It is predicated upon equitable rules of estoppel, upon the maxim that he who seeks equity must do equity, upon the doctrine of unjust enrichment and upon elemental principles of equity and good conscience. None of these were even considered by the Court below. Certainly the many pertinent facts in the record were not discussed; apparently they were not considered; and manifestly no attempt was made to determine whether Johnson would have been able to substantiate fully his case had there been a trial on the merits.

The relevant facts are that Tuolumne desired a dredge but did not have the funds with which to build it. (Tr. 212) RFC loaned the funds to Tuolumne taking as security a first chattel mortgage on the dredge to be constructed (Tr.

34-37). In a simultaneous transaction Johnson agreed to build the dredge, waiving all liens to secure the purchase price and agreeing to abide by the terms of the chattel mortgage. (Tr. 192-3). The entire loan of \$600,000 and Tuolumne's down payment of \$50,000 were put into a Construction Fund, payments from which were subject to RFC control. (Tr. 38-39) This entire fund was to be used exclusively for construction of this dredge (Tr. 119) and the fund was large enough to pay for the dredge.

Thereafter, and while the final payment to Johnson for the dredge remained unpaid, RFC paid the last \$100,000 of the loan into the Construction Fund, (Tr. 187) and then approved payment out of that fund of the entire balance for uses other than those originally designated (Tr. 412-13). Then, while Johnson was still not paid, it brought this foreclosure suit and asserts that its first mortgage is prior to Johnson's claim.

Johnson contends it has a prior lien. That claim rests primarily upon grounds of equitable estoppel. A case in point is:

Wichita Fed. Sav. & L. Ass'n v. Jones, 155 Kan. 821,
130 P. 2d 556 (1942)

There the money lender with a first mortgage did not make the entire loan, and because of that, some of the suppliers of labor and material were not paid. They filed mechanic's liens. The Court held that, although the mortgage was expressly senior to the mechanic's liens, the mortgagee was estopped to set up that priority. The Court said at 130 P. 2d 559:

"We are of opinion the materialmen in seeking information as to the source from which they were to be paid and learning that a mortgage had been made for

the purpose of financing construction, had a right to rely thereon, at least to the extent that the amount of the loan would be advanced, whether they received it or not."

This principle of estoppel has frequently been invoked to prevent a mortgagee from asserting the priority of his lien when his conduct would render it unconscionable to enforce the security to the prejudice of another.

"The holder of a mortgage on land may be estopped to assert the priority of his lien against a subsequent purchaser or encumbrancer by any act, conduct or omission of his own which would render it unconscionable to enforce the security to the other's prejudice."

Knox v. Kaelber, 140 N. J. Eq. 474, 55 A. 2d 53 (1947).

Mitchell v. West End Park Co., 171 Ga. 878, 156 S.E. 888 (1931);

Northwestern Mut. Sav. & L. Ass'n v. Kessler, 66 N. D. 737, 268 N.W. 692 (1936);

Title Guar. T. & S. Bank v. Clifton Forge Nat. Bank, 149 Va. 168, 140 S.E. 272 (1927).

The *Title Guarantee* case illustrates why RFC cannot now profit from a situation where Johnson was induced by it to forego any lien on the dredge. In that case the defendant had a first deed of trust prior to plaintiff's claim, but failed to take steps to protect it, relying upon plaintiff's statements recognizing it. The Court said at p. 274:

"After twice lulling the Clifton Forge Bank into security by conduct of this sort, the appellant cannot now be permitted to change front to the injury of appellee."

RFC, therefore, cannot claim that its mortgage is a lien on the dredge prior to Johnson's claim. Foreclosure of the

chattel mortgage by RFC, and sale, cannot affect the rights of the parties. Equity will transfer Johnson's lien to the proceeds of the sale and enforce it against RFC.

Pomeroy, Equity Jurisprudence, Vol. IV, Sec. 1080
(5th Ed. 1941)

Thus the decision below should be reversed with instructions that Johnson's claim is a prior lien to that of RFC's mortgage. At the very least Johnson should be permitted to present his case at trial.

B. Johnson's claim of lien was not "extinguished" by the statute of limitations.

After holding that Johnson had no lien, the court proceeded to say that even if it did have a lien, the lien was "extinguished" by the applicable six-year Federal statute of limitations (Tr. 265).

We contend that the court erred in applying the statute of limitations rather than the equitable doctrine of laches to Johnson's claim of lien. We have just shown in the preceding subsection of this section III of our brief that the lien which Johnson asserted was based upon grounds of equitable estoppel, *supra*, pages 38-9. Furthermore, RFC itself began the present suit as a suit in equity. It thus appears that this whole proceeding is essentially an equitable one. Therefore, the court below should not have applied the statute of limitations as a bar to Johnson's claim of lien.

Had the court applied laches rather than limitations, it would have had no difficulty in ascertaining that, at the very least, a genuine issue of fact existed on the question of laches. All the factual background that we reviewed

above applies with even greater force in a determination of laches.

The distinction is clearly brought out by Justice Frankfurter in *Holmberg v. Armbrecht*, 327 U. S. 382, 66 S. Ct. 589, 90 L. Ed. 743 (1946) where the opinion points out that if plaintiff's claim were a legal one, it would have been barred by the State statute of limitations, but because the suit was one in equity, the State statute of limitations was inapplicable. Then the opinion holds that laches was not a bar, saying:

“Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair. See *Russell v. Todd*, supra (309 US at 289, 84 L ed 761, 60 S Ct 527). ‘There must be conscience, good faith, and reasonable diligence to call into action the powers of the court.’ *McKnight v. Taylor*, 1 How (US) 161, 168, 11 L ed 86, 88. A federal court may not be bound by a State statute of limitation and yet that court may dismiss a suit where the plaintiffs’ ‘lack of diligence is wholly unexcused; and both the nature of the claim and the situation of the parties was such as to call for diligence. * * *’ *Benedict v. New York*, 250 US 321, 328, 63 L ed 1005, 1011, 39 S Ct 476. A suit in equity may fail though ‘not barred by the act of limitations. * * *’ *McKnight v. Taylor*, supra; *Alsop v. Riker*, 155 US 448, 39 L ed 218, 15 S Ct 162.

“Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that ‘laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon

some change in the condition or relations of the property or the parties.' *Gallihier v. Cadwell*, 145 US 368, 373, 36 L ed 738, 740, 12 St Ct 873. See *Southern P. Co. v Bogert*, 250 US 483, 488, 489, 63 L ed 1099, 1106, 1107, 39 S Ct 533. And so, a suit in equity may lie though a comparable cause of action at law would be barred. If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time."

We confidently assert that if there had been a trial, and the test of laches rather than limitations had been applied, Johnson's claims would not have been barred, nor would his lien have been declared "extinguished."

IV.

THE COURT ERRED IN HOLDING THAT RFC WAS NOT UNJUSTLY ENRICHED AND IN IGNORING ISSUES OF MATERIAL FACT BEARING UPON THE CLAIM OF UNJUST ENRICHMENT.

A. An unpaid contractor who has relied for payment upon a construction loan has an equitable lien on the loan fund to secure payment, and the lender who diverts part of the fund to other uses is to that extent liable to such contractor.

The trial court's error in granting summary judgment on the third ground of counterclaim is best illustrated by the court's conclusion (Tr. 271):

"Under the pleadings, the stipulation, and the exhibits in this case, Johnson has completely failed to establish 'unjust enrichment' on the plaintiff's part."

Here again the court decided the case "on the merits"; it failed utterly to realize that its task, under Rule 56, was

but to determine whether there was a genuine issue as to any material fact. In giving as its reason that "Johnson has completely failed to *establish* unjust enrichment * * *" (italics added), the court's action becomes palpably erroneous, since Johnson had no burden of "establishing" any fact at all on summary judgment procedure.

The court did concede that RFC was enriched (Tr. 270). It was enriched because it received all the earnings from the operation of the dredge (Tr. 270). It was further enriched in that it received the dredge as security for its first chattel mortgage while Johnson remained unpaid. Then by this very suit RFC sought to enrich itself even more by selling at foreclosure a security for which it has never fully paid, and pocketing the proceeds without using any part of them to pay for that security.

But although the enrichment is conceded, the court held that injustice was not established, relying on *Bailis v. RFC*, 128 F. 2d 857 (3d Cir. 1942). But the facts of the *Bailis* case are clearly not analogous as that case involved the sale of assets mortgaged to RFC without its consent. We submit that in cases with analogous facts, the courts have invariably given the unpaid contractor a remedy, basing the decision on one or another of several equitable theories.

The principles here applicable were developed by courts of equity in builders' cases. They may be summarized briefly by saying that the builder will be paid, and the lender must use all of the loan funds to pay him. Thus, when a bank or other lender lends a fixed sum of money to a property owner for construction of a building, taking a first mortgage or deed of trust for security which is prior to all mechanic's lien claims, then all of the loan fund must be devoted to costs of construction of the building until all

such costs are paid. That means, if any supplier of material or labor is not paid in full, that any unexpended portion of the loan fund is impressed with an equitable lien in favor of the unpaid suppliers, who to this extent come ahead of the mortgage.

Smith v. Anglo-Calif. Trust Co. 205 Cal. 496 (1928);
Pacific Ready-Cut Homes, Inc. v. Title Ins. & Trust Co. 216 Cal. 447 (1932);
Theatre Realty Co. v. Aronberg-Fried Co., Inc., 85 F. 2d 383 (8th Cir. 1936).

In the *Smith* case, the landowner borrowed from the bank to improve his property, giving a first deed of trust as security. \$5000 was still unpaid to suppliers when the job was finished, and over \$4000 of the construction loan was still in the hands of the bank. The court recognized that the deed of trust was senior to the liens of the suppliers, and that the bank had no duty to see to it that the money advanced was used to pay for labor and materials. However, the court emphasized that the suppliers relied upon the loan as the source of payment and, although there was no actionable wrong, intended trust, or third party beneficiary contract, these suppliers had an equitable lien in the unexpended portion of the loan fund. The bank was therefore directed to apply the \$4000 in liquidation of the claims of the suppliers.

In the *Pacific Ready-Cut Homes* case this doctrine was applied under similar circumstances to prevent the lender from using the balance of the loan fund to reduce the amount owing on the loan. It was held that the lender with a first deed of trust which by its terms was senior to mechanic's liens was nevertheless liable to unpaid suppliers

until the loan fund was exhausted. The court said at p. 450, 452:

“The *Smith* case, as appears from the foregoing quotation, was decided upon the dual grounds that the owner and the lender were estopped by their conduct to withhold the fund, and that the claimants had an equitable lien thereon. The essential basis of the opinion is the justifiable reliance upon the fund by the lien claimants. If similar reliance appears in the instant case, the former decision is controlling.

* * *

“The defendant mortgage company, having received the benefit of plaintiff’s performance in the form of a completed building and therefore a more valuable security for its note, is not justified in withholding or appropriating to any other use money originally intended to be used to pay for such performance and relied upon by plaintiff in rendering its performance. The theory of equitable lien, as laid down in the *Smith* case, is quite broad (see 17 Cal. L. Rev. 411), and it is fully applicable to the instant case. (See, also, *Community Lumber Co. v. Chute*, 215 Cal. 268 (10 Pac. ((2d)) 57); *Community Lumber Co. v. California Pub. Co.*, 215 Cal. 274 (10 Pac. ((2d)) 60).”

Another California case has reached the same result on this same theory: that the builder has an equitable lien in the loan fund and all of this fund must be utilized to pay costs of construction.

San Mateo P. M. Co. v. Davenport R. Co., 218 Cal. 702 (1933).

Application of the equitable lien doctrine to facts closely resembling those here before the court is illustrated by

Theatre Realty Co. v. Aronberg Fried Co., Inc., 85 F. 2d 383 (8th Cir. 1936).

In that case, on March 8, 1927, a property owner agreed to issue bonds to the lender, secured by a first deed of trust, in order to finance construction of a building on the property. Knowing of this agreement and on the very next day, the plaintiff contracted to construct the building. The bonds were then issued under a deposit agreement whereby the loan was put in trust, part to be used to pay interest on the loan and the balance to be used to pay construction costs. The court held that an equitable lien attached to this trust fund, and the lender was liable to the partially unpaid plaintiff, irrespective of its first deed of trust. There, as here, the loan funds were placed in a special fund and were to be used to pay construction costs. In both cases, the builder knew of the loan, relied on it, and entered into the construction agreement almost simultaneously with the execution of the loan agreement. Then construction was completed and the builder was unpaid although a portion of the construction fund remained. And, just as RFC contends here, the lender in that case contended that its first deed of trust was a superior lien to any the unpaid builder might have.

In spite of this contention, the court held that there was an equitable assignment and also an equitable lien. The court emphasized the builder's reliance upon the loan as the source of payment. It held that the lender would be unjustly enriched if it were to receive the funds owed to the builder. The equitable lien, the court said, was based upon general considerations of justice, upon the principle that he who seeks the aid of equity must do equity, and the doctrine of unjust enrichment.

These same considerations have prompted courts in cases like the one at bar to protect the unpaid builder upon other theories.

Wichita Fed. Sav. & L. Ass'n v. Jones, 155 Kan. 821, 130 P 2d 556 (1942);

Whiting-Mead Co. v. West Coast B & M Co., 66 C.A. 2d 460 (1944).

In the *Wichita* case the court held that a mortgagee was estopped from asserting the priority of his first mortgage as against the unpaid materialmen.

The *Whiting-Mead* case applied yet another theory. There, the holder of the first deed of trust had not expended the full amount of the loan, and some costs of construction of the building had not been paid. The court held the unexpended balance of the loan was a trust fund for the benefit of the unpaid suppliers of labor and materials. Under this theory, RFC was duty bound to see to it that the Construction Fund was used solely for the originally intended purposes, until all bills were paid. It chose not to do so, and permitted it to be diverted to other uses. The trust was thus violated, and RFC, the trustee, became liable at least when it repudiated its obligation to pay Johnson at the close of Johnson's litigation with Tuolumne in 1949.

These many cases, based upon a diversity of equitable theories encompass the facts of the case here before the court. Indeed, of all the builders who have been unjustly treated, Johnson stands at the forefront.

The salient fact is that Tuolumne had no funds with which to construct a dredge, as everybody knew (Tr. 212-13). Tuolumne negotiated for months with RFC for a loan (Tr. 212). Then on May 11, 1937 Tuolumne, the Anglo-California National Bank and RFC entered into the "Indenture and Chattel Mortgage" (Tr. 17) to secure a loan by RFC to Tuolumne of \$600,000 (Tr. 18), Tuolumne itself was to put up only \$50,000 and the entire \$650,000 was in

the Construction Fund to be used to pay for the dredge (Tr. 38-39).

Simultaneously Johnson and Tuolumne entered into the construction agreement, which is the basis of this action (Tr. 192), by which Johnson agreed to build the dredge for Tuolumne on a cost-plus basis with a \$552,500 maximum (Tr. 200). This agreement between Tuolumne and Johnson was prepared in RFC's offices (Tr. 212). It bound the parties to the terms of the RFC resolution authorizing the loan and to the Indenture and Chattel Mortgage (Tr. 193, 194, 205). The entire transaction was manifestly a three-party deal.

By the construction agreement, Johnson was bound to deliver the dredge free of liens (Tr. 193-4), thus subjecting the dredge to RFC's first mortgage. Johnson retained no lien of any kind as security even though Tuolumne had no funds (Tr. 212) and in spite of the fact that Johnson knew RFC controlled Tuolumne's earnings (Tr. 47-50, 193). This was contrary to Johnson's usual practice of insisting on a reservation of title as security (Tr. 213). It is crystal clear, therefore, that Johnson could expect payment from only one source, the RFC loan, and Mr. Johnson stated that he relied upon, and looked to this fund alone for payment (Tr. 212).

RFC intended that Johnson should be paid out of the loan. The proceeds of the loan were to be used for certain specific purposes as shown on a list Mr. Johnson saw in RFC's offices (Tr. 398). They were to be used "exclusively" for construction of the dredge (Tr. 119) as everyone, including RFC and Johnson, knew (Tr. 119). The loan fund was large enough to pay Johnson in full, it was intended that Johnson be paid in full, and in fact it was the intent that almost the entire loan to Tuolumne would eventually be

paid to Johnson (\$552,500 out of the \$650,000 Construction Fund). RFC had complete control of the Construction Fund of \$650,000, no payment from which could be made without written approval of RFC (Tr. 38-39). Nevertheless, RFC, knowing all these facts, and knowing that over \$51,000 was still due to Johnson (Tr. 213-214), paid the remaining \$100,000 of the loan into the Construction Fund and thereafter approved use of the entire balance in that fund for purposes other than those originally specified (Tr. 412-13). This RFC did although it had told Johnson that the last \$40,000 would be held for Johnson (Tr. 409) and although Johnson was even then diligently attempting to collect the amount due from Tuolumne, as RFC well knew.

As a result of RFC's acts no available source of funds was left for the payment of Johnson's claim, except the earnings of the completed dredge, and these RFC controlled (Tr. 47-50) and appropriated solely to its own use (Tr. 417-18), leaving Johnson unpaid.

It is difficult to conceive of any enrichment more unjust than was this. This is a case which demands the intervention of a court of equity far more than did those cases, heretofore cited, wherein under one theory or another, the court insured that the builder got paid in spite of the lender's first mortgage. Yet these facts were not even mentioned by the court below in its opinion (Tr. 265-271).

Very obviously the court below was disturbed because it could not definitely determine from the limited record the scope of Johnson's claim. Consequently it felt compelled to write a letter to Johnson's counsel seeking a stipulation or some other means of clarification (Tr. 267). This action again demonstrates that the court misconceived completely the extent of its task on a motion for summary judgment.

For without this clarification, it proceeded to decide the case on the merits and to deny Johnson the chance to try his case.

Quite clearly, the court did not perceive the relevance of the equitable lien theory heretofore outlined. Yet the enforcement of equitable liens is by no means uncommon;

“The equity courts look with favor upon equitable liens, and frequently such liens are employed to do justice and equity and to prevent unfair results.” *Man-non v. Pesula*, 59 Cal. App. 2nd 597 (1943).

They are founded upon elemental principles of equity and good conscience.

Back v. Back's Adm'r, 281 Ky. 282, 135 S.W. 2d 911 (1940);

Scott v. Kirtley, 113 Fla. 637, 152 So. 721 (1934).

As the court said in:

Cleveland Clinic Foundation v. Humphrys, 97 F. 2d 849, 856 (6th Cir. 1938) cert. den. 305 U. S. 678, 59 S. Ct. 93, 83 L. Ed. 403 (1938).

“In the absence of an express contract, a lien based upon fundamental maxims of equity may be imposed and declared by a court of equity out of general considerations of right and justice as applied to the relationship of the parties and the circumstances of their dealing.”

See also:

Lindell v. Lindell, 150 Min. 295, 185 N.W. 929 (1921);
Theatre Realty Co. v. Aronberg-Fried Co., Inc.,
supra.

It is not surprising, therefore, that unpaid builders and suppliers have universally been protected in circumstances such as this.

E.g., *Town of Covington v. Alonzo B. Hayden, Inc.*,
 27 F. 2d 360 (5th Cir. 1928);
Security Fed. S. & L. Ass'n v. Underwood C & S Co.,
 245 Ala. 56, 16 So. 2d 100 (1943);
Anderson Inv. Co. v. Jones, 104 Wash. 142, 176 Pac.
 17 (1918).

In the *Town of Covington* case, the Circuit Court of Appeals held it proper to impress a lien on the unused proceeds of a sewer bond issue in favor of the unpaid contractor. The court said:

“There could be no doubt that the bonds disposed of were sold for the purpose of paying for the work to be done under appellee’s contract, and that the proceeds were dedicated to that purpose * * *” (p. 360).

This language is in point here. Since the entire loan fund was earmarked for construction of the dredge and related uses (Tr. 37, 38, 119, 200), RFC’s diversion of the moneys to other purposes was wrongful.

This diversion of funds is clearly one basis of RFC’s liability. Once the lien attached to the moneys in the Construction Fund, it is manifest that RFC could not escape that lien by transferring the funds to third parties.

National Surety Co. v. County Bd. of Educ., 15 F. 2d 993 (4th Cir. 1926);

Cf. *Hadley v. Passaic Nat. B & T Co.*, 113 N. J. Eq. 548, 168 Atl. 38 (1933).

As the court said in the *Pacific Ready-Cut Homes* case, *supra*, 216 Cal. at 452:

“The defendant mortgage company, having received the benefit of plaintiff’s performance in the form of a completed building and therefore a more valuable security for its note, is not justified in withholding or

appropriating to any other use money originally intended to be used to pay for such performance'' (Italics added).

In another case it was said:

“The Pacific American Association made no promise either express or implied, to pay said claim. It had, however, certain funds in its hands to pay the cost of constructing said building, and it was in duty bound to apply said funds to that purpose.” *San Mateo Planing Mill Co. v. Davenport Realty Co.*, 218 Cal. 702, 710 (1933).

RFC was in duty bound to apply the loan to pay the cost of constructing the dredge. When it failed to do so, and thereafter in 1949 repudiated all obligation to Johnson, it became liable.

The impressment of an equitable lien depends almost entirely upon the facts of the particular case, since the doctrine rests upon principles of equity and good conscience.

E.g., *Mannon v. Pesula*, 59 C.A. 2d 597 (1943).

The right of action is necessarily uncertain:

“It is necessarily the case that something of vagueness and uncertainty should attend a doctrine that is of such wide and varied application as is this of equitable lien * * *” *Society of Shakers v. Watson*, 68 Fed. 730, 739 (6th Cir. 1895), cert. denied, 163 U. S. 704, 16 S. Ct. 1206, 41 L. Ed. 313 (1895).

The right to such a lien depends, not alone upon the writings or agreements in the case, but upon all the “attendant circumstances.”

Walker v. Brown, 165 U. S. 654, 173 S. Ct. 453, 41 L. Ed. 865 (1897).

Only by a full trial on the merits could all the pertinent facts be brought forth. By denying Johnson the right to trial, the District Court effectively prevented Johnson from developing the myriad facts which cumulatively would have established beyond fear of contradiction both the right of action and the date of its inception. That was error, and the judgment should be reversed.

B. A lender who holds a first mortgage senior to mechanic's liens and a second mortgage junior to such liens upon property constructed by the unpaid lienholders, is unjustly enriched when it applies the earnings from that property to payment of the mortgages without first paying the costs of construction.

The unjustness of RFC's enrichment is palpable, if all the facts in the record are considered. At the very least, there was a genuine issue as to the facts on this point, making the summary judgment improper.

It is a basic principle in the law that a contractor shall be paid. The common law gave those who constructed or sold goods, or even repaired them, a lien to secure payment, and such liens have been incorporated into the law of most jurisdictions, including California.

California Civil Code, Sections 3046 et seq.

Contractors are specifically provided for by mechanic's lien statutes, the purpose of which is to insure payment for work done and materials furnished.

California Code of Civil Procedure, Sections 1181 et seq.

These concepts have been applied and reinforced over and over again by the courts of California and other states.

“The law contemplates that when one receives a benefit at the expense or detriment of another, he should compensate the latter to the extent of the reasonable value of the benefit received.” *Leoni v. Delany*, 83 C.A. 2d 303, 307 (1948).

“When one person performs services for another, the law raises an implied promise to pay a reasonable compensation therefor.” *Lazzarevich v. Lazzarevich*, 88 C.A. 2d 708, 721 (1948).

Johnson has not been paid. Although its claim is in form against Tuolumne, it was recognized from the outset that Tuolumne had no funds with which to pay for the dredge (Tr. 212). Nevertheless Johnson waived all liens and subordinated its claim to RFC's mortgage (Tr. 193-4). To what, then, did Johnson look for payment?

Only two sources of funds were available from which to pay for the dredge: first, the Construction Fund into which the RFC loan was paid; and second, the earnings from the completed dredge. By the terms of the Indenture RFC had complete control over both of these sources of funds, and all other assets which Tuolumne had (Tr. 38-39, 47-50).

Johnson looked to the first source for payment, as Mr. Johnson stated (Tr. 212). Obviously RFC knew this, and this fund was to be used exclusively to pay for the dredge (Tr. 119). Nevertheless, RFC permitted the balance of the Construction Fund to be diverted to uses other than those for which it was originally designated (Tr. 412-413). It did this knowing that Johnson was owed some \$51,000 (Tr. 214). Thus the intended source of funds to pay Johnson was destroyed and Johnson was left only with a claim against Tuolumne. Since Tuolumne had no other assets, the only other source of funds for payment was the earnings from the dredge itself. RFC had complete control over the disposition of these earnings also (Tr. 47-50).

Having dissipated the Construction Fund, RFC should have used these earnings from the dredge Johnson built to pay Johnson for building it. Instead RFC took the net earnings unto itself (Tr. 417-18). Not only did it apply them to payments on the first mortgage, it used \$120,000—more than enough to pay Johnson's entire claim—to completely pay off the second mortgage which was equitably a junior lien to Johnson's claims (Tr. 184-5). Thus the earnings, the only remaining source of funds, were likewise applied entirely to other uses.

Whether it was intentional or not, RFC took control of all Tuolumne's assets, actively aided Tuolumne in resisting Johnson's claim and even provided funds for that purpose (Tr. 218), took all of Tuolumne's earnings as long as there were any earnings, refusing to use any of them to make the final payment on the dredge, and then left Tuolumne insolvent and unable to pay Johnson for the dredge. Thus, although the original agreements of May 11, 1937 contemplated that Johnson would be paid, and that RFC, who controlled all possible sources of payment, would release funds for such payment, RFC diverted *all* the funds to other uses. Now it piously asserts that insolvent Tuolumne alone is liable, in spite of the fact that neither Johnson nor RFC ever expected that Tuolumne itself would pay for the dredge.

The doctrine of unjust enrichment was tailor-made for this case.

"The doctrine of unjust enrichment * * * applies to situations where as a matter of fact there is no legal contract, but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another." *Matarese v. Moore-McCormack Lines*, 158 F. 2d 631, 634 (2d) (1946).

See

Restatement, Restitution, Sec. 1 (1937)

One who is unjustly enriched may be required to make restitution both in equity and in law.

“* * * the rule is that irrespective of the intent of the party to be charged, liability arises when one is enriched and receives a benefit at another’s expense for which equitably he ought to pay. It has been held in a variety of circumstances that when such a situation occurs a contract to pay is implied in law.” *Ross Engineering Co. v. Pace*, 153 F. 2d 35, 45 (4th Cir. 1946).

The obligation is implied in law, meaning it is created by operation of law. As the court said in

Old Men’s Home, Inc. v. Lee’s Estate, 191 Miss. 669, 4 So. 2d 235, 236 (1941)

speaking of implied in law contracts:

“Such contracts rest upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.”

This is one of the basic principles upon which many of the equitable lien cases rest.

Theatre Realty Co. v. Aronberg-Fried Co., Inc., 85 F. 2d 383 (8th Cir. 1936);

Knabb v. Mabry, 137 Fla. 530, 188 So. 586 (1939);

Scott v. Kirtley, 113 Fla. 637, 152 So. 721 (1934).

Here, RFC’s liability is implied by law because of its conduct.

“An implied contract is one that ‘is inferred from the conduct, situation or mutual relation of the parties and enforced by the law on the ground of justice.’ (*Jennings v. Bank of California*, 79 Cal. 323 (21 Pac. 852,

12 Am. St. Rep. 145, 5 L R.A. 233).’’ *Grant v. Long*, 33 C.A. 2d 725, 736 (1939);

“It is elementary that ‘implied contract has its foundation in the doctrine of unjust enrichment.’ 26 American Law Reports 562.” *Anderson v. Doolittle*, 97 C.A. 2d 836, 837 (1950).

In the case at bar liability can be imposed upon RFC because a direct promise by RFC to pay Johnson can be implied from the facts. (Tr. 212-14).

“The law will imply a contract from the circumstances.” *City Ice and Fuel Co. v. Bright*, 73 F. 2d 461, 464 (6th Cir. 1934).

“An implied contract is one, the existence and terms of which are manifested by conduct.” (Civ. Code, Sec. 1621). An implied contract is one that is inferred from the conduct, situation, or mutual relations of the parties, and enforced by law on the ground of justice. (Jennings v. Bank of California, 79 Cal. 323 * * *’’ *Medina v. Van Camp Sea Food Co.*, 75 C.A. 2d 551, 553-4, 171 P. 2d 445, 447 (1946).

Here RFC and Tuolumne prepared the Tuolumne-Johnson agreement and RFC reviewed the entire transaction (Tr. 212). Mr. Johnson told RFC that he was looking for payment solely to the funds advanced by RFC (Tr. 212). Everyone, including RFC, knew that Tuolumne alone could not pay for the dredge absent the loan (Tr. 212-13). Johnson was willing to enter the deal and waive a lien on the dredge only because of, and in reliance on, the RFC loan (Tr. 213-14, 395-96). The fund was large enough to pay for all costs of constructing the dredge, including the entire Johnson claim. The RFC funds were to go into a Construction Fund and to be paid out of that fund only with RFC approval (Tr. 38-39). These funds were to be used solely

for construction of the dredge (Tr. 39, 119) as everyone including RFC and Johnson knew (Tr. 119). Mr. Johnson was shown a list in the RFC offices giving all the purposes for which the fund was to be used (Tr. 398). It was clearly tacitly understood by all, and agreed by RFC that this money was to go to Johnson to pay for the dredge. It is clear, therefore, that in essence RFC was to pay Johnson for the dredge, using the Construction Fund as a means of insuring that payment was not made until the work was properly completed.

RFC never doubted its liability nor contested it. Upon many occasions between 1944 and 1947 Mr. Macartney of RFC told Mr. Johnson

“* * * that as soon as the Federal court case (between Johnson and Tuolumne) was finally determined in our (Johnson's) favor, if it was, RFC would arrange to pay Johnson Company.” (Tr. 219).

It is submitted that all of the parties originally contemplated that Johnson would be paid by RFC by use of the loan fund; that when RFC diverted the final portion of this fund to other uses, both it and Johnson assumed that RFC became individually liable to this extent to Johnson, and RFC expected to pay if Johnson's suits against Tuolumne proved successful. Not until 1949 did RFC change its stand. But its obligation to pay remained. Its duty to pay may be implied from the circumstances, and its liability to pay may be imposed to prevent unjust enrichment.

We submit that RFC must make restitution.

Restatement, Restitution, Sec. 1 (1937)

“Section 1. Unjust Enrichment.

A person who has been unjustly enriched at the expense of another is required to make restitution to the other.

* * *

“Comment:

a. A person is enriched if he has received a benefit (see Comment b). A person is unjustly enriched if the retention of the benefit would be unjust * * *

RFC's unjust enrichment is three-fold. *First*, Johnson provided the security for both RFC's first mortgage and its second mortgage while RFC used the funds designated for building the dredge to make later repairs on it, or for some such purpose (Tr. 413).

Second, RFC took the earnings, leaving Tuolumne nothing with which to pay Johnson. That was the very essence of injustice.

Finally, by this suit RFC seeks to foreclose its first mortgage, sell the dredge and take all the proceeds, still without paying for the dredge.

V.

THE COURT ERRED IN HOLDING THAT RFC WAS ENTITLED TO APPROPRIATE THE PROCEEDS OF OPERATING THE DREDGE WHILE JOHNSON REMAINED UNPAID FOR CONSTRUCTING IT. THE COURT FAILED TO CONSIDER WHETHER SUCH APPROPRIATION CONSTITUTED A CONSTRUCTIVE FRAUD AND CONVERTED RFC INTO A CONSTRUCTIVE TRUSTEE.

A. RFC's appropriation of the earnings of the dredge amounted to a constructive fraud against Johnson and resulted in RFC's becoming a constructive trustee.

It is Johnson's contention that RFC's appropriation of all the earnings of the dredge was a constructive fraud on Johnson, and that RFC holds such earnings as a constructive trustee for Johnson. This contention the court below summarily dismissed by saying

“There is absolutely nothing in the record to support a charge of dishonesty on the part of plaintiff.” (Tr. 272.)

We respectfully urge that the court erred in at least two respects. First it again evidenced its erroneous view that on a motion for summary judgment under Rule 56, the party seeking relief must prove his case. That is not required. The court’s duty is not to decide the case, but to determine whether or not there are genuine issues of fact to be tried.

Secondly, the court completely misconceived Johnson’s claim. Johnson’s fourth cause of counterclaim sets forth that RFC “did improperly and unlawfully pay to itself from the proceeds of the operation of the dredge * * *” and that RFC had full knowledge of Johnson’s rights “* * * but in fraud of such rights appropriated to itself all of the proceeds * * *”

Even under rules of pleading far more strict than those prescribed by the Federal Rules, this cause of action would not be limited to a claim of deliberate dishonesty or intentional fraud. In fact the clear implication is a charge of constructive fraud, and indeed that is what Johnson does claim. By refusing to consider this claim, the court below, committed error, and its decision should be reversed.

The rule is that when one acquires title to property to which another has a better right, a court of equity will convert him into a constructive trustee.

Crosby v. Clark, 132 Cal. 1 (1901);

Johnson v. Clark, 7 C. 2d 529 (1936).

“A constructive trust is imposed not because of the intention of the parties but because the person holding the title to the property would profit by a wrong or would be unjustly enriched if he were permitted to

keep the property. A constructive trust, unlike an express trust or resulting trust, is remedial in character. (Restatement, Trusts, Vol. 2, p. 1249).'' *Sampson v. Bruder*, 47 Cal. App. 2d. 431, 435 (1941).

A court of equity will raise a constructive trust for the purpose of working out right and justice in the most efficient manner.

Pomeroy, Equity Jurisprudence, Vol. 1, Sec. 155;

Vol. 4, Sec. 1044 (5th ed. 1941);

Scott on Trusts, Vol. 3, Sec. 462.2 (1939).

When RFC appropriated to itself the earnings from the dredge to which Johnson had a better right under all the circumstances, RFC became a constructive trustee.

This is but another equitable remedy which will serve to right the wrong Johnson suffered. The gist of that wrong is that RFC induced Johnson to build the dredge and waive its lien in reliance upon the RFC loan (Tr. 212-14). Then RFC, which had complete control over both Tuolumne's assets and its earnings, used the Construction Fund (consisting of Tuolumne's down payment and RFC's loan) for other purposes and then took the earnings for itself. Johnson was left unpaid with a claim against Tuolumne, which by this time was insolvent. Then by this suit RFC seeks to sell and take the proceeds of the only asset of value Tuolumne has, which ironically is the very dredge which Johnson built but for which Johnson was not fully paid.

Aside from all other reasons for converting RFC into a constructive trustee, it seems apparent that the confidential relation RFC held toward Johnson will alone serve as sufficient basis for use of this equitable remedy. This confidential relationship stemmed from the fact that by the original three-party deal of May 11, 1937, RFC obtained

control over Tuolumne's assets and earnings and therefore all possible sources of funds to which Johnson could look for payment. RFC thus had a duty to be fair with Johnson and to use that control so as not to prejudice Johnson's rights. This it did not do; it violated that trust and it should not now be permitted to retain the fruits of that wrong, be it only a constructive wrong.

"A constructive trust may be imposed when a party has acquired property to which he is not justly entitled, if it was obtained by actual fraud, mistake or the like, or by constructive fraud through the violation of some fiduciary or confidential relationship." *Mazzer v. Wolf*, 30 Cal. 2d 531, 535 (1947).

A trust or agency relationship in the strict sense is not required to establish a constructive trust; it is the special facts of the individual case which govern:

"Constructive trusts of this form are not based primarily on the intention of the parties but are forced on the conscience of the trustee by equitable construction and the operation of law. (*Millard v. Hathaway*, 27 Cal. 119). In such trusts, based upon fraud or wrongdoing, an oral promise is sufficient and the existence or absence of a confidential relationship between the parties, in the strict sense, is not controlling." *Rankin v. Satir*, 75 Cal. App. 2d 691, 695 (1946).

Not only does RFC hold the earnings of the dredge as a constructive trustee, it must likewise hold any proceeds from sale of the dredge in trust for Johnson until Johnson is paid in full.

The Construction Fund itself was held by RFC in trust for Johnson, to be used for the purposes originally designated.

Whiting-Mead Co. v. West Coast B & M Co. 66 C.A. 2d 460 (1944).

When RFC permitted the monies remaining in that Fund to be put to other uses, and when it denied its obligation to pay for the dredge, it violated its trust and became liable to Johnson for the full amount due.

B. The statute of limitations does not begin to run against a constructive trustee until repudiation of the trust.

It is well recognized that the statute of limitations does not begin to run against a constructive trustee until he repudiates the trust by some word or deed sufficient to notify the person for whose benefit the constructive trust is imposed of the repudiation.

The case of *Oldland v. Gray*, 179 F. 2d 408 (10th Cir. 1950) supports this statement fully. In impressing a constructive trust upon the property for the plaintiff's benefit, the court stated:

"Nor is the claim barred by laches or limitations. Equity does not bar a claim of this kind unless it is equitable to do so. Time does not begin to run against a trust until it is openly disavowed by the trustee."

In *Strausburg v. Connor*, 96 C.A. 2d 398 (1950), the grantor sought to cancel a deed for failure of the grantee to pay the full purchase price. The court held that the statute of limitations did not begin to run against the grantor until the defendant had demanded exclusive possession of the land. To support its conclusion, the court said:

"Appellant pleads the statute of limitations as embodied in various sections of the Code of Civil Procedure, but the record signally fails to substantiate her contentions. Where property is obtained under the circumstances and by the means shown here the obligation to make restitution is a continuing one and the statute does not begin to run until the trustee repudiates the

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trust. (*Svistunoff v. Svistunoff*, 94 Cal. App. 2d 651 (211 P. 2d 352); *Steinberger v. Steinberger*, supra.)

See also:

Prussing v. Prussing, 46 CA 2d 347 (1941);
O'Brien v. O'Brien, 50 C.A. 2d 658 (1942);
Howard v. Howe, 61 F. 2d 577 (CCA 7th Cir. 1932);
Steinberger v. Steinberger, 60 C.A. 2d 116 (1943);
Svistunoff v. Svistunoff, 94 C.A. 2d 651 (1949).

The record in this case, incomplete as it is, shows clearly that RFC as a constructive trustee recognized its obligation many times to pay Johnson if Johnson won its suit against Tuolumne (Tr. 215, 216, 217-18, 219). It is clear from these statements, which RFC has not contradicted by affidavit, that responsible officials in the mining division and the legal division of RFC never at any time before the successful conclusion of Johnson's suit against Tuolumne repudiated RFC's obligation to pay Johnson if it prevailed in that litigation. It was not until after Johnson finally won that suit that RFC shifted position, refusing to pay Johnson because it thought that the legal question was a "close one." (Tr. 239).

Since wrongful detention from Johnson is the essence of the wrong, it is quite clear that RFC did not repudiate its obligation to pay Johnson until 1949, and for that reason the statute of limitations did not begin to run in favor of RFC until that time. At the very least Johnson should have been afforded an opportunity to present evidence at a trial to expand and sharpen the proof it has already presented by way of affidavits and deposition on this point. To deny Johnson that opportunity was prejudicial error.

VI.

THE COURT ERRED IN HOLDING ON SUMMARY JUDGMENT THAT RFC WAS NOT LIABLE FOR PAYMENT OF THE SALES TAXES ON THE DREDGE SINCE THERE WERE GENUINE ISSUES OF FACT UPON WHICH SUCH LIABILITY WAS PREDICATED.

At the time the contract between Johnson and Tuolumne was entered into, it was thought that there would be no sales tax payable on the price of the dredge (Tr. 148). However, the parties anticipated that such a tax might be assessed so they provided in Article X of the construction contract (Tr. 199-203) that "sales taxes paid thereon, if any, and in accordance with Article XIII," should be a proper charge against the revolving fund which in turn would be replenished from the Construction Fund over which RFC had control. Further in the construction contract, Johnson and Tuolumne treated the sales tax problem specifically.

"Article XIII. Any sales taxes required to be paid to the State of California upon any of the transactions described in this agreement, not including, however, such taxes upon purchases of tools, equipment, and machinery of the second party for its use in the prosecution of the work, are to be paid by the first party and shall not be considered as a part of the maximum guaranteed price heretofore set forth but shall be put into said revolving fund in addition to said maximum guaranteed price, but the second party will not be entitled to charge or receive ten (10%) percent thereof or any other amount on account of such payment." (Tr. 204).

It should be noted here that Mr. Johnson in his letter of June 30, 1944 to Mr. Kuehl, chief counsel of the Mining Division of RFC, stated:

"The matter of the sales tax was discussed by all parties concerned and with representatives of your legal

and engineering departments during the time the terms of the contract were developed and written." (Tr. 163)

As the construction contract was negotiated and drafted under RFC supervision and control, it is clear that RFC tacitly agreed to approve any sales tax assessed on the price of the dredge as a legitimate charge on the Construction Fund. It is equally clear that RFC tacitly agreed that any sales tax would be a proper charge, if necessary, against the earnings of Tuolumne contained in the trust fund set up by Article IV of the Indenture (Tr. 47-50) which was under RFC control (Tr. 48). In effect, the parties were to consider any such taxes, if they arose, as a cost item of the dredge. It is obvious that they would be a cost as they would not be assessed on profits but on the full price of various cost items used in the construction.

In early 1941, after the completion of the dredge, the State Courts of California established the right of the State to collect a sales tax on work done under contracts similar to the construction contract in this case (Tr. 148). Johnson, required by California law to pay the tax in the first instance as contractor, protested but its protest was denied (Tr. 141). It subsequently paid the balance of taxes due plus a ten percent penalty and accrued interest. It has never been repaid (Tr. 89).

When Johnson paid the amount due on account of the tax, it became entitled to reimbursement. According to the terms of Article XIII of the construction contract, this amount became a cost of the dredge so RFC's duty to see that Johnson was reimbursed was the same as its duty to see that the Construction Fund was properly expended to pay Johnson's other claims. It is interesting to observe that when Johnson and RFC nearly settled their differences in

1951, the sales tax was one of the items included in the proposed settlement by RFC. In a letter to Mr. Johnson dated August 15, 1951, Mr. McCullough of RFC stated:

We are instructed to advise you that this Corporation will complete the pending foreclosure and, if and when the underlying collateral is acquired, it will be sold to your company without representation or warranty for \$154,276.93, that being the difference between the proposed sales price of the dredge and \$70,723.07 representing the face amount of your judgment *and claim for taxes* against Tuolumne Gold Dredging Corporation, upon condition that you dismiss your counter-claims with prejudice and execute a release in full in manner and form satisfactory to our legal counsel. (Tr. 224-5). (Italics added).

Furthermore, Mr. Johnson stated in his answer to Interrogatory No. 19 that payment of all sales taxes was repeatedly approved by many persons connected with RFC and particularly Mr. McCartney (Tr. 117).

On this question, as on other items previously discussed, our contention is that RFC's liability depends not merely upon the terms of the 1937 indenture and construction contract, but also on the dealings and negotiations between the parties. Therefore, we submit there were genuine issues of fact upon which the liability of RFC was predicated and the court should not have summarily denied trial on this issue.

CONCLUSION

We have shown it is the law that when a lender establishes a trust fund for the purpose of paying a builder, and the builder, who would otherwise have a lien upon the building, relies instead upon the trust fund for payment, the lender will be liable to the builder if he then diverts the trust fund to other purposes.

We have shown that the question of RFC's liability involves substantial issues of fact, such as the intent of the parties, Johnson's reliance on the trust fund, the many dealings and negotiations between the parties, the practical construction of its obligations as shown by RFC's conduct, the appropriation by RFC of the proceeds of operation of the dredge, and the question whether this enrichment was unjust.

Moreover, we have shown that in instances where a party admits liability, but requests deferment of suit until other litigation is concluded, such party cannot later assert the statute of limitations, if suit is brought seasonably after termination of the other litigation.

We have shown that there is much evidence to the effect that RFC admitted its liability to Johnson, but asked deferment of its demands until other litigation was concluded. We have shown that the doctrine of equitable estoppel to assert limitations depends on the acts and conduct of the parties which is certainly a genuine issue of fact in the instant case.

We have shown that the District Judge misconceived his limited powers and duties in passing upon a motion for summary judgment. We have shown that he did not refer to the factual issues at all. Yet he purported to decide some of Johnson's claims "on the merits." And he purported to apply the statute of limitations to other claims completely ignoring substantial factual reasons which prohibit the assertion of the statute of limitations. We have shown that in the similar case of *Begnaud v. White*, 170 F. 2d 323 (CCA 5-1940) the failure to recognize the issue of equitable estoppel as a bar to limitations was reversible error.

Johnson was entitled to a trial on the merits. Johnson was entitled to its day in court. It was entitled to put Mr. John-

son on the stand, so that he could personally present his facts to the court in full and without summary deprivation of the right of full hearing. He has been denied this fundamental right afforded by our judicial system. Therefore the summary judgment should be reversed.

Respectfully submitted,

EDWIN SPRAGUE PILLSBURY

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Attorneys for Appellant

Dated: San Francisco, California

April 19, 1954

No. 14,122

IN THE
United States
Court of Appeals
For the Ninth Circuit

WALTER W. JOHNSON COMPANY,	}
vs.	
RECONSTRUCTION FINANCE CORPORATION,	
	<i>Appellant,</i>
	<i>Appellee.</i>

Reply Brief of Appellee

FILED

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IN THE
United States
Court of Appeals
For the Ninth Circuit

WALTER W. JOHNSON COMPANY,

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION,

Appellee.

Reply Brief of Appellee

This is a case arising out of a scheme to recover gold from the bed of the ancient Tuolumne River in Stanislaus County, California. Tuolumne Gold Dredging Corporation (herein called Tuolumne) owned part of the land and held options on other parts which were to be dredged. Most of its capital had been spent in acquiring land and in exploration. Walter W. Johnson Company (herein called Johnson) was in the dredge building business and made arrangements with Tuolumne which led to a contract to build a dredge to mine the land. Reconstruction Finance Corporation (herein called RFC) agreed to loan Tuolumne

money for its venture. The details of the relationships between the parties are developed later in this brief.

After the dredge was built, a dispute arose between Tuolumne and Johnson, Tuolumne claiming the dredge was unable to perform properly and Johnson claiming it had not been paid in full. While litigation between them went on for several years the dredge was operated, though not full-time during the curtailment of gold mining operations during World War II. Eventually the land was dredged so far as feasible and, the operation as a whole being unprofitable, Tuolumne was left with a huge debt to RFC and a substantial judgment against it in favor of Johnson. RFC then brought an action against Tuolumne to foreclose its mortgage, also naming as formal parties the trustee under the trust indenture and chattel mortgage and Johnson and Johnson's bonding company because of their interest in the judgment against Tuolumne. Johnson then filed what the District Court uniquely described as a quinquefoliate counterclaim against RFC, in which it sought a money judgment for the same items which were already the subject of its judgment against Tuolumne.

Except for some omissions, which we will shortly mention, the manner in which this action reached the present state in litigation has been adequately set forth by appellant. To complete the history of the case it should be added that, after summary judgment was granted on Johnson's counterclaim, application was made for default judgments against defendants, other than Johnson, and a second motion for summary judgment, on RFC's complaint, was made. The latter motion was duly submitted to and granted by the Court. No appeal has been taken from the judgment entered after the granting of the second motion, and judgment on the complaint has been entered and has become final. The documents pertaining to this phase of the case are not included in the written transcript of record on this appeal as appeal was taken only from the judgment against Johnson on its counterclaim. They are referred to only in the Certificate of Clerk to Record on Appeal. (Tr. 447-8)

It does not appear in the transcript on appeal but it is of record in the District Court that, pursuant to the Judgment and Decree of Foreclosure and Sale, the property of Tuolumne, including both the land and the dredge, has been sold at public auction by a special master appointed by the District Court. A final decree has been entered which approved the sale and which directed the special master to execute a deed and bill of sale conveying the property to RFC, the purchaser at the public sale. The final decree bars the defendants, including Johnson, and all persons claiming under them from ever asserting any right or equity of redemption, and from claiming any right, title or interest in or to, or any lien upon the property, or any part thereof. The deed and bill of sale conveying the property to RFC, as purchaser, were prepared and delivered pursuant to the decree.

Johnson ignored all proceeding after the summary judgment on plaintiff's complaint was granted.

This additional history of the litigation has been referred to because the judgment entered on RFC's complaint finally and conclusively disposes of all issues. It adjudicated exactly the same issues involved in Johnson's counterclaim and Johnson is barred under the principles of *res judicata* from re-litigating the same issues. We will first answer Johnson's brief and then discuss this new defense.

STATEMENT OF THE CASE

In determining whether or not there is any genuine issue of fact requiring a trial, there is a unique feature in this case which should be kept foremost in the mind of the Court, that is, that everything upon which the motion for summary judgment was made and granted was admitted to be true by Johnson. All the facts which were relied on before the District Court and all the facts which are relied on in the judgment of the District Court are admitted by Johnson. The admissions obtained from Johnson by

stipulation or through discovery processes were so complete that it was unnecessary for RFC to offer a single affidavit. If there are any conflicts in the record they are only the self-contradictions of Johnson. Self-contradictions by one party do not create genuine issues of fact between the opposing parties.

Rather than restate the case completely we will merely correct, where necessary, some inaccuracies in Johnson's brief. These inaccuracies do not indicate issues of fact, however. They are merely a result of misunderstanding or misinterpretation.

At the bottom of page 2 it is stated that Tuolumne and Johnson negotiated their contract after RFC had resolved to loan Tuolumne money. This is presumably part of the "broad factual background" Johnson relies on. The record shows that the statement is inaccurate. Johnson and Tuolumne had planned and negotiated together for months before RFC decided to loan Tuolumne money. They had proceeded so far as to have a contract between them drafted for the construction of the dredge seven months before the loan was made. Before that Johnson had made suggestions for further prospecting of the ground, after RFC had first refused the application for a loan. Johnson located and recommended key employees for Tuolumne during its preliminary work. Johnson spent months in drafting plans and specifications for the dredge before the loan was made. Johnson even loaned Tuolumne \$20,000 or \$25,000 and loaned McDonald, Tuolumne's president, \$6000 personally. Johnson and Tuolumne were so closely allied and had carried their joint efforts so far that RFC found it necessary to warn Johnson on February 2, 1937, (Tr. 134-5) that it had no responsibility in the arrangements between Johnson and Tuolumne. (See deposition of Walter W. Johnson, Tr. 284, 286, 290, 291, 294, 295, 297, 300, 306, 307, 313, 326-7, 347, 357-8, 360-2, 365, 370, etc. and exhibits attached to the deposition. Exhibit 9, Tr. 441, refers to a contract of October 29, 1936, although it states 1937. The error as to date was corrected at Tr. 378.)

It was not until shortly before the indenture between Tuolumne and RFC was executed that RFC had any opportunity to examine the Johnson-Tuolumne contract to satisfy itself that its terms did not conflict with or infringe upon the proposed trust indenture.

Johnson emphasizes RFC's interest in the construction contract, but such interest is a logical and necessary one on the part of a money lender. A loan agency must scrutinize a construction contract to see that the money it lends is not to be spent profligately. Such care on its part does not make it an obligor on such a contract. Nor does it give the contractor any rights against the lender. The most reasonable step a lender can take is to ascertain, before a loan is made, what kind of a deal the borrower is entering. RFC took such a part in the Johnson-Tuolumne affair, but the record shows that it dealt with each at arm's length. RFC did not become a party to the construction contract and Johnson was not an obligee or a beneficiary of the trust indenture. It is important to note that through Johnson's shrewdness, and by reason of its independence in bargaining, it protected itself in its construction contract with Tuolumne by inserting a provision that it would not be bound on that contract until Tuolumne actually received the first advance on the RFC loan. (Article XVI, Tr. 205)

It is stated on page 3 of the brief that RFC and Tuolumne depleted the construction fund and that they expended it for other purposes. It is a fact that the construction fund was spent. Whether there was anything wrongful about it is a matter of legal argument, not a question of fact, which will be dealt with later.

It is also claimed that RFC improperly advanced money to Tuolumne for the purpose of contesting its litigation with Johnson. This claim is untrue, but is immaterial here and will be ignored.

Beginning on page 6 of the brief are a series of argumentative statements with which we disagree. In doing so, however, we take issue only on the interpretation and legal significance of the

facts. The facts themselves have been admitted by Johnson. No genuine issue of fact is created simply because the parties disagree as to their legal significance or effect. There may be room for legal argument, but, where the facts are proved in their entirety by Johnson's admissions or stipulations, self-contradictions appearing by way of self-serving statements do not create genuine issues between the parties.

It is asserted that Johnson relied on RFC. It is broadly implied that RFC guided Johnson into its transaction with Tuolumne. These assertions are not accurate. The facts are that all of the parties acted independently, as is plain from the written agreements. If any two of the three worked in collusion, Johnson and Tuolumne were the pair. Johnson did not come into the affair at the last minute as an innocent party called from the sidelines. As mentioned above, it assisted Tuolumne for about two years in the preliminary work which was necessary before a loan could be made. Johnson even took an active part in assisting Tuolumne in convincing RFC that the whole dredging project would be practicable and profitable after RFC had once refused a loan.

It is unnecessary to go into any more factual detail. The negotiations resulted in two lengthy and unambiguous documents which superseded everything that had gone before. Those documents fixed the relationship of the parties. They are before the Court and no one has suggested that their meaning and intent cannot be determined from reading them. Indeed, under the well-settled parol evidence rule their meaning must be determined from the written provisions. Where the parties have reduced to writing all of the terms of an agreement between them, oral evidence cannot be used to change those terms. *St. Paul F. & M. Ins. Co. v. Balfour*, 168 F. 212 (C.A. 9, 1909); Restatement of Contracts, § 237. There are some exceptions to the rule, but Johnson did not plead any and has made no showing by way of affidavit or otherwise that the agreement between RFC and Tuolumne on the one

hand, or the agreement between Johnson and Tuolumne on the other, is anything other than what appears in the respective documents.

The gravamen of every claim Johnson makes is that the use of the construction fund was limited to payment for the dredge or that at least a portion of the fund equal to the amount due under the Johnson-Tuolumne construction contract was so limited. The answer to this is the terms of the indenture. An examination will reveal no exclusive dedication of the construction fund or any ascertainable part of it to the purpose of paying Johnson. On the contrary the trust indenture permits the widest possible application of the construction fund. RFC protected itself, not by dedicating the loan fund to certain narrow purposes as some lenders have done, but by retaining a veto power on expenditures from the fund. It is true that some specific uses and the general purpose of the loan are set forth, but these are followed by the phrase "and to provide Trustor (Tuolumne) with working capital." (Tr. 18) The term "working capital" is so broad that the use of the fund for any corporate need of Tuolumne is within its meaning.

It is correctly stated that \$510,000 was paid to Johnson, but the argument that RFC "caused payments" is misleading. The fact is that payments to Johnson were made pursuant to the construction contract, as Johnson has stipulated. (Tr. 187) It is also admitted that the payments were made between June 15, 1937 and May 28, 1938. (Tr. 119-20)

Johnson tries to make much of RFC's offer to approve a payment of an additional \$40,000 to Johnson from the loan fund. The offer has no significance as a basis of liability. It is elementary that negotiations and attempts to settle litigation are not evidence of liability. The occurrence simply shows that RFC would not have prevented a settlement of the differences between Tuolumne and Johnson, even though the amount due Johnson under the terms of

the contract, after credit to Tuolumne for items not furnished and under the penalty clause, was less than the amount discussed.*

On page 8 and elsewhere in the brief Johnson refers to what it calls "obligations" of RFC to Johnson. It will be demonstrated herein that each and every theory Johnson suggests to support such obligations is lacking in legal validity. This again, is a matter of argument on the legal significance of the facts. It is not a dispute over the facts themselves.

We need not discuss the Johnson-Tuolumne litigation. It is irrelevant. RFC was not a party to it and for that reason nothing determined therein is binding upon it.

Johnson refers at page 10 to its allegation that "in addition * * * RFC appropriated 11 years of earnings of the dredge." Apparently it is thought that some opprobrious connotation is to be inferred from the use of the word "appropriated." The facts are not in dispute that RFC was paid out of earnings of the dredge. As Johnson has stipulated, the second loan was repaid in its entirety with interest and part of the first loan was repaid, all in accordance with the terms of the trust indenture from earnings of the dredge.† (Tr. 182-3, 184-5) The facts themselves are not challenged; Johnson simply argues that the legal conclusion ought to be drawn that the payments were not lawful.

*The facts show that Johnson could claim at most about \$33,000 on the contract. (Interrogatory No. 24, Tr. 104; and Answer 24, Tr. 118). Of the \$552,500 maximum, \$510,000 was paid and credits of over \$9,000 were allowed Tuolumne. Everything that Johnson claims beyond that amount is outside of the construction contract, and, even under Johnson's theory, was not contemplated as a charge under the construction contract. There is not the flimsiest justification for considering Johnson as anything but a general credit of Tuolumne for anything in excess of about \$33,000 (without considering the possibility of interest). Assuming that Johnson once had a special claim on the loan fund for payments due under the construction contract, its other claims were not entitled to that same benefit.

†The arrangement between RFC and Tuolumne was known to all concerned as a "self-liquidating" project, i.e., the loan was to be paid out of the earnings. Johnson was fully aware of this before it contracted with Tuolumne.

Next it is asserted, as though a trump card were being played, that RFC made "excuses" to Johnson for not paying it and that one or another of the employees of RFC said that RFC would arrange to pay the Johnson Company. We will examine the purported promise later in this brief to determine whether a legal obligation could arise in that manner. At this point we merely ask the Court to consider how incredible it would be that a governmental agency would so casually undertake, without any written record, an obligation to pay a claim of over fifty thousand dollars in a conversation between an engineer employed by it and the representative of a company which was competing with RFC as a creditor of a debtor company which owed the government nearly half a million dollars. Not only was Johnson's claim questionable at all times, but it was in litigation between Johnson and the debtor at the very time that the alleged promise was supposed to have been made. It is so fantastic on its face that it is inherently unbelievable.

However, we do not depend on the absurdity of Johnson's claim to support the judgment of the District Court. Johnson's own admissions prove it to be untrue. Again, we point out that this is no genuine issue of fact. Rather, Johnson's grandiose conclusions that RFC had promised to pay Tuolumne's debt to it is categorically disproved by factual admissions of Johnson. Whatever may be Johnson's recollections of conversations which occurred twelve or fifteen years ago, the documentary evidence shows that RFC did not at any time undertake an obligation to pay it. Time after time it tried to get RFC to pay what Tuolumne allegedly owed, but just as often it was turned down in plain and unmistakable terms.

A review of the correspondence attached to the Requests for Admissions shows indisputably that RFC did not promise to pay Johnson anything. Beginning with the letter of February 2, 1937, (Tr. 134) which has already been referred to, a letter written

the contract, after credit to Tuolumne for items not furnished and under the penalty clause, was less than the amount discussed.*

On page 8 and elsewhere in the brief Johnson refers to what it calls "obligations" of RFC to Johnson. It will be demonstrated herein that each and every theory Johnson suggests to support such obligations is lacking in legal validity. This again, is a matter of argument on the legal significance of the facts. It is not a dispute over the facts themselves.

We need not discuss the Johnson-Tuolumne litigation. It is irrelevant. RFC was not a party to it and for that reason nothing determined therein is binding upon it.

Johnson refers at page 10 to its allegation that "in addition * * * RFC appropriated 11 years of earnings of the dredge." Apparently it is thought that some opprobrious connotation is to be inferred from the use of the word "appropriated." The facts are not in dispute that RFC was paid out of earnings of the dredge. As Johnson has stipulated, the second loan was repaid in its entirety with interest and part of the first loan was repaid, all in accordance with the terms of the trust indenture from earnings of the dredge.† (Tr. 182-3, 184-5) The facts themselves are not challenged; Johnson simply argues that the legal conclusion ought to be drawn that the payments were not lawful.

*The facts show that Johnson could claim at most about \$33,000 on the contract. (Interrogatory No. 24, Tr. 104; and Answer 24, Tr. 118). Of the \$552,500 maximum, \$510,000 was paid and credits of over \$9,000 were allowed Tuolumne. Everything that Johnson claims beyond that amount is outside of the construction contract, and, even under Johnson's theory, was not contemplated as a charge under the construction contract. There is not the flimsiest justification for considering Johnson as anything but a general credit of Tuolumne for anything in excess of about \$33,000 (without considering the possibility of interest). Assuming that Johnson once had a special claim on the loan fund for payments due under the construction contract, its other claims were not entitled to that same benefit.

†The arrangement between RFC and Tuolumne was known to all concerned as a "self-liquidating" project, i.e., the loan was to be paid out of the earnings. Johnson was fully aware of this before it contracted with Tuolumne.

Next it is asserted, as though a trump card were being played, that RFC made "excuses" to Johnson for not paying it and that one or another of the employees of RFC said that RFC would arrange to pay the Johnson Company. We will examine the purported promise later in this brief to determine whether a legal obligation could arise in that manner. At this point we merely ask the Court to consider how incredible it would be that a governmental agency would so casually undertake, without any written record, an obligation to pay a claim of over fifty thousand dollars in a conversation between an engineer employed by it and the representative of a company which was competing with RFC as a creditor of a debtor company which owed the government nearly half a million dollars. Not only was Johnson's claim questionable at all times, but it was in litigation between Johnson and the debtor at the very time that the alleged promise was supposed to have been made. It is so fantastic on its face that it is inherently unbelievable.

However, we do not depend on the absurdity of Johnson's claim to support the judgment of the District Court. Johnson's own admissions prove it to be untrue. Again, we point out that this is no genuine issue of fact. Rather, Johnson's grandiose conclusions that RFC had promised to pay Tuolumne's debt to it is categorically disproved by factual admissions of Johnson. Whatever may be Johnson's recollections of conversations which occurred twelve or fifteen years ago, the documentary evidence shows that RFC did not at any time undertake an obligation to pay it. Time after time it tried to get RFC to pay what Tuolumne allegedly owed, but just as often it was turned down in plain and unmistakable terms.

A review of the correspondence attached to the Requests for Admissions shows indisputably that RFC did not promise to pay Johnson anything. Beginning with the letter of February 2, 1937, (Tr. 134) which has already been referred to, a letter written

before the indenture and construction contract were entered into, RFC kept itself free from entanglement in the Johnson-Tuolumne relationship. As soon as the dredge was built, Johnson clamored for final payment and Tuolumne claimed that the dredge was defective. Johnson tried then to bring RFC into the controversy, but on August 28, 1938, RFC notified Johnson that controversies between it and Tuolumne concerning their contract must be settled between the contracting parties. (Ex. 3, Tr. 136)

Early the next year Johnson asked RFC for information concerning the loan fund, for it had received word that it was being used for other purposes than payment to Johnson. RFC put Johnson on notice again that it would not enter the controversy, by advising Johnson to seek information from Tuolumne directly. (Ex. 4, Tr. 137; Ex. 5, Tr. 138)

On May 29, 1941, Johnson proposed a settlement. (Ex. 10, Tr. 143) On July 9, 1941, Johnson was advised by RFC that its proposal was not acceptable. (Ex. 11, Tr. 146)

A year and a half later, on January 18, 1943, Johnson tried again. On this occasion it asserted practically the same claims now embodied in its counterclaim. It requested a loan from RFC and offered "to halt all other further action until after the appeal" of Tuolumne in the state court action between Johnson and Tuolumne. (Ex. 13, Tr. 151) On January 27, 1943, RFC rejected the proposal. (Ex. 14, Tr. 156) Johnson was advised that RFC would take no action to involve itself in the Johnson-Tuolumne litigation. RFC would not recommend payment for supplies claimed to have been furnished outside of the construction contract, for that claim was a part of the litigation. RFC stated that it would consider a recommendation or requisition, if one were made by Tuolumne, regarding the sales tax on the dredge. There was no promise to pay such sales tax out of RFC's funds or even a promise to preserve part of the earnings of the dredge for that purpose.

The next year Johnson tried again. On June 30, 1944, it wrote RFC, after furnishing it with a legal memorandum prepared by its attorney. (Ex. 15, Tr. 158) At that time Johnson requested RFC to furnish the money to Tuolumne to pay the judgment Johnson had obtained in the State Court action. The judgment covered all of the items now the subject of the counterclaim except the sales tax. The same arguments were made in the letter in 1944 that are made in Johnson's brief on this appeal. In RFC's reply on July 29, 1944, Johnson was advised that RFC recognized no liability either for the amounts supposed to be due under the construction contract or on the sales tax claim. It was called to the attention of Johnson that Tuolumne was in default in payments to RFC. (Ex. 16, Tr. 164) Then Johnson threatened to execute on its judgment against Tuolumne's property, but nothing came of that. (Ex. 18, Tr. 166) Johnson's attorney talked to certain RFC employees about such threatened execution or garnishment, but RFC did not commit itself to the means it would take to protect its interests. (Request for Admission No. 19, Tr. 129; Answer No. 19, Tr. 169; Ex. 19, Tr. 167)

Another effort by Johnson to get RFC to pay what Tuolumne allegedly owed was made by Johnson's attorney in October, 1947. RFC again refused to pay Johnson anything. (Request for Admission No. 21, Tr. 139; Answer No. 21, Tr. 169)

A couple of years later Johnson brought the matter up again (Tr. 230) but no promise was made by RFC. Johnson's attorney conferred with an attorney for RFC who informed him he could not recommend any payment. (Tr. 239)

Finally, in 1951, Johnson offered to buy out RFC's claim against Tuolumne. (Ex. A, Tr. 221) RFC made two counteroffers, neither of which was accepted. (Ex. B, Tr. 224; Ex. C, Tr. 225) By that time this action had been on file for two years.

This documentary evidence is not contested or explained in any way by Johnson. The documents themselves show conclusively

that Johnson was never treated as anything but a competing creditor whose claims against Tuolumne were a threat to recovery by RFC of its loan. Johnson was held at arm's length and was never led to neglect or forego any legal rights or remedies it might have had. In none of the documents is there any statement which could possibly be tortured into a promise by RFC to pay the debts, if any, owed Johnson by Tuolumne. The only thing that held Johnson back from suing RFC or from attempting to proceed directly against Tuolumne's property was Johnson's own lack of confidence in the validity and enforceability of its claims. It hoped to accomplish through threat, plea and negotiation what it knew it could not in a lawsuit. Johnson was simply trading on its nuisance value, which it greatly overrated.

Johnson's "reliance" on alleged oral requests or promises by RFC's employees is unbelievable in view of the undisputed facts of the documents just outlined. The truth of the matter is that every conference between a representative of Johnson and an employee of RFC was followed up by correspondence, which Johnson admits to be authentic. The correspondence shows that, whatever understanding or misunderstanding anyone may have had about what was said orally, the exchange of letters put the record straight between them every time. Those letters show that as often as Johnson renewed its pleas, RFC refused them. RFC neither undertook nor promised to undertake to pay Johnson, either from its own funds or from funds of Tuolumne.

Johnson argues that a "long and continuous relationship" and a "broad factual background" could be shown if there were a trial of this case. The argument fallaciously assumes that legal liability could somehow be created thereby without making some respectable showing how or why the written documents, particularly the correspondence between the parties and the two basic agreements, the indenture and the construction contract, can be disregarded or sufficiently changed in meaning to achieve that liability. Johnson

has not made any showing that the documents mean anything other than what they say and the documentary evidence in this case makes it impossible for Johnson to raise a factual issue. That is why the District Court acted entirely with propriety in granting a summary judgment.

It is argued that counsel for RFC made some concession as to the validity of Johnson's claims by inquiring at length through discovery processes into the factual background of Johnson's claims. If that argument had any merit, the value of discovery would be lost. It is also argued that it is inconsistent to urge that no genuine issue as to a material fact exists after making such inquiry. The answer to this is quite plain. The results of the discovery processes demonstrated convincingly that Johnson's claims were baseless. Despite considerable probing nothing could be discovered to support them. It became evident from the information obtained through stipulation and admission that Johnson could develop no genuine issue of fact.

Before turning to the arguments in support of Johnson's specifications of errors, the Court's attention is directed to the state of the pleadings. The allegations of paragraphs I, II, III, IV, V, VI, IX, X and XI of the complaint are admitted in paragraph I of Johnson's answer and in sections 1, 2, 3, 4 and 5 of the Agreed Statement of Facts. Paragraphs VII and VIII of the complaint are not material on this appeal.

The allegations of paragraph XII of the complaint are denied in Johnson's answer but are admitted in the last part of section 5 of the Agreed Statement of Facts. The allegations of paragraph XIII of the complaint are also denied in the answer but are admitted in section 6 of the Agreed Statement of Facts. The allegations of paragraph XIV of the complaint are admitted in paragraph III of the answer and in section 7 of the Agreed Statement of Facts.

The allegations of paragraph XV are admitted in part and denied in part in paragraph IV of the answer. Said paragraph IV

affirmatively alleges that Johnson has right, title and interest and lien senior to the lien of RFC and the allegations of Johnson's counterclaim are incorporated by reference in paragraph IV of the answer to the complaint.

The allegations of paragraph I of the second cause of action in RFC's complaint are admitted in paragraph V of Johnson's answer and in the Agreed Statement of Facts, said paragraph I being repetitive of the first nine paragraphs of RFC's first cause of action. The allegations of paragraphs II and III of RFC's second cause of action are admitted in part in paragraph VI of Johnson's answer and the remainder of such allegations are admitted in section 8 of the Agreed Statement of Facts. The allegations of paragraph IV of RFC's second cause of action are admitted in part in paragraphs III and IV of Johnson's answer and in section 7 of the Agreed Statement of Facts, with the exception, as in the first cause of action, of Johnson's affirmative allegation that it has right, title, interest and lien senior to the lien of RFC and with the same reference to Johnson's counterclaim.

The only allegation of the complaint not admitted in the answer or the Agreed Statement of Facts was the allegation of paragraph XV that any right, title, interest or lien of any defendant is junior and subordinate to the lien of RFC's indenture and chattel mortgage. Whether the RFC lien was senior became exclusively a question of law when the facts were all admitted.

Johnson affirmatively pleaded one other matter. It is alleged in paragraph VIII of the answer that, by reason of the acceptance by RFC of the net proceeds of the operation of the dredge and repayment thereby of the second loan, RFC violated the rights of Johnson and is estopped from asserting the validity of its lien under the first indenture and chattel mortgage. Facts relevant to such allegations are stipulated in parts 10 and 11 of the Agreed Statement of Facts. Whether an estoppel arose is also exclusively a question of law since Johnson has admitted the determinative facts.

In its first cause of counterclaim Johnson claims to be a third party beneficiary of the indenture and chattel mortgage. In its second cause of counterclaim Johnson asserts that it is entitled to a lien superior and senior to any lien of the RFC. (The type of lien is not specified.) In the third cause of counterclaim Johnson alleges that RFC has been unjustly enriched in that it received the proceeds of the operation of the dredge without paying a payment to Johnson for the dredge." In the fourth cause of counterclaim it is alleged that RFC "in fraud" of Johnson's rights "appropriated to itself all of the proceeds of the operation of the dredge and applied them to discharge" a junior encumbrance (the second mortgage). In the fifth cause of counterclaim Johnson alleged that it had to pay a sales tax on the dredge and that RFC "admitted the amount of such tax as above alleged was due and payable to Johnson" under the construction contract.

We respectfully submit that the only issues are legal, not factual. The parties dispute the legal conclusions to be drawn from the facts, thus presenting the classic setting for summary disposition.

THE DISTRICT COURT ACTED WITHIN THE SCOPE OF ITS POWERS IN GRANTING SUMMARY JUDGMENT

Appellee complains bitterly that summary judgment was granted "on the merits" as well as on the procedural defense of limitations. The complaint is unjustified. The effect of the disposition of a case on a motion to dismiss or for summary judgment is exactly what appellant claims it should not be—an *adjudication of the merits*. *Suckow Borax Mines Consol. v. Borax Consolidated*, 185 F.2d 196 at 205, (C.A. 9, 1950).

The *Borax* case also holds that affirmative defenses such as the statute of limitations not appearing on the face of the complaint (counterclaim in this case) may be established upon a motion to dismiss or for summary judgment when, by affidavits, depositions

and admissions, a set of undisputed facts is revealed upon which the moving party is entitled to judgment as a matter of law.

This Court has specifically held that a party against whom a counterclaim is asserted may move for summary judgment under Rule 56 at any time. *Gifford v. Travelers Protective Association of America*, 153 F.2d 209 (C.A. 9, 1946). The *Gifford* case also holds that summary judgment may issue when the defense is that of laches. That defense may present only a question of law, which can be disposed of by summary judgment. *Monroe v. Ordway*, 103 F.2d 813, (C.A. 8, 1939); *Dixon v. American T. & T. Co.*, 159 F.2d 863, (C.A. 2, 1947), cert. den. 332 U.S. 764, reh. den. 332 U.S. 839, reh. den. 332 U.S. 856, reh. den. 333 U.S. 850.

When a case is at issue and there is no dispute as to any material fact and the facts have been stipulated through a series of pretrial hearings and the plaintiff is entitled to judgment as a matter of law, plaintiff's motion for summary judgment should be granted. *Noble v. Kavanagh*, 66 F. Supp. 258, (D.C. Ohio, 1946) aff'd. 160 F.2d 104 (C.A. 6, 1947).

RFC, as defendant on Johnson's counterclaim, produced evidence through discovery processes and stipulation which was all admitted to be true. That evidence, if believed, was sufficient to entitle RFC to a directed verdict if the case had been tried before a jury; there being no conflicting evidence, a jury could not disregard it. That is a sufficient test for summary judgment. Johnson had an opportunity to show that the evidence was untrue or to explain it away or to show the Court that other evidence could be adduced which would change the result. It did none of these things. All it could muster was some affidavits which barely touch on the material issues and do not detract from the admittedly true facts which show that RFC is entitled to judgment as a matter of law. Under those circumstances summary judgment was appropriate. See *Gifford v. Travelers, etc.*, at page 211.

The whole purpose of the summary judgment rule is to separate real and genuine issues from mere formal or pretended ones.

When a general statement in pleadings is shown by specific facts to be untrue and the facts thus presented are not denied and are not of such nature as to be purely within the knowledge of the affiant, there is no genuine issue remaining for the trial of the facts. See *Suckow etc. v. Borax, etc.*, at page 205. Similarly, when the only conflict, if such it be, is a self-contradiction between generalized conclusions of an individual and documents written at the time of the critical events, the authenticity of which documents the individual admits, no *genuine* issue of facts exists.

The tests stated in *Whitaker v. Coleman*, 115 F. 2d 305 (C.A. 5, 1940), cited several times by Johnson, may be applied to the affidavits filed in opposition to the motion for summary judgment. In order to create an issue of fact such affidavits must neither be (a) statements concerning immaterial matters, (b) too incredible to be accepted by reasonable minds, or (c) if true, lacking in legal probative force.

The affidavit of Mr. Walter W. Johnson does not meet these tests. Mr. Johnson stated at some length therein his views as to certain events preceding the execution of the trust indenture and chattel mortgage between RFC and Tuolumne and the execution of the Johnson-Tuolumne construction contract. The apparent purpose of the statements is to persuade the Court to accept the interpretation which Johnson would place upon the two documents. We submit that the documents speak plainly for themselves. No reason has been shown why the written words should be disregarded. Interpretation of each document is a legal question which the Court can determine from within its four corners.

It is quite clear from Mr. Johnson's own recitation of events prior to May 11, 1937, that Johnson and Tuolumne collaborated for a long time in a joint effort to persuade RFC to loan Tuolumne money. If the arrangement was such between RFC, Tuolumne and Johnson that Johnson was to have rights against RFC, Johnson was fully aware of the problems and should have taken oc-

casion while the documents were being prepared to make certain that the trust indenture and chattel mortgage gave it the rights which it now claims.

Mr. Johnson's affidavit contains his views as to the Johnson-Tuolumne litigation and his conclusions about certain statements by employees of RFC to the effect that no payment could be made to Johnson until the litigation was terminated. No contract binding RFC to pay Johnson any debts owed by Tuolumne could possibly be derived from these statements of Mr. Johnson. The affidavit lacks probative force in this respect. Mr. Johnson also refers to the efforts made by the Johnson Company to have RFC bail it out by paying the judgment Johnson had obtained against Tuolumne. No enforceable contract requiring RFC to do so could possibly be derived from these statements.

Finally, Mr. Johnson refers to the efforts of the Johnson Company to buy out the RFC claims against Tuolumne in 1951. This matter has already been discussed and requires no further comment.

The affidavit of Mr. Harley Hise refers solely to efforts on behalf of the Johnson Company in 1947 to have the RFC pay to Johnson what Tuolumne owed it. RFC refused to do so and Mr. Hise agrees that RFC refused to pay. There is absolutely nothing in the affidavit which indicates that RFC ever made any promise or representation to Johnson that it would pay or was obligated to pay to Johnson what Tuolumne owed it. Any facts stated in the letter attached to Mr. Hise's affidavit are not vouched for by Mr. Hise. The affidavit merely states that the letter was written to him on August 4, 1949, and that the exhibit is a copy of what Mr. Smith, who was Johnson's attorney, wrote.

The affidavit of Mr. Smith fails to raise a question of fact. It concerns itself first with irrelevant hearsay statements concerning the means by which attorneys for Tuolumne were paid. The statements are incorrect, as is apparent from Mr. Kelly's

affidavit and from the express terms of the indenture and the chattel mortgage, but they are immaterial and we need waste no time with them. Money used by Tuolumne, either for operation expenses or for the purpose of protecting itself in litigation had to come from the trust fund, which was subject to RFC's veto power as it was part of the security for the loan. It was Tuolumne's money, nevertheless, and RFC could hardly render the struggling debtor defenseless by refusing to allow it to use its own funds to pay costs of litigation. Furthermore, the trust fund into which the earnings of the dredge were deposited was a different fund from the construction fund and Johnson had only the claim of a general creditor against the trust fund.

The Smith affidavit next refers to attempts by representatives of Johnson to get RFC to pay Johnson money which it was unable to collect from Tuolumne. We have already reviewed Johnson's efforts over a period of 13 years to persuade RFC to give it some money. Mr. Smith simply replows some of the same ground. His affidavit indicates at most that on occasion there were some differences of opinion among employees of RFC as to whether or not Johnson's claim had any merit. Nothing in Mr. Smith's affidavit indicates that RFC ever determined that the claim had enough merit to warrant any promise or representation to Johnson that RFC would pay it. Nothing in the Smith affidavit indicates that the correspondence which has been discussed above does not truthfully set forth the series of refusals by RFC to all of the requests by Johnson. Throughout the entire period Johnson was free at any time to pursue its legal remedies, if any, against either RFC or Tuolumne in order to protect whatever rights it may have had. It was not impeded or delayed by RFC on any occasion.

The affidavit of Mr. William T. Kelly requires little comment. Nothing stated therein raises an issue of fact. Mr. Kelly's opinions, interpreting some events, change nothing. The documents which

resulted from the negotiations for the RFC loan and from the negotiations between Johnson and Tuolumne for the building of the dredge speak for themselves. Mr. Kelly's statement is confusing in paragraphs 4 and 5 in its references to the "trust fund." He meant to say "construction fund." As is clear from the terms of the trust indenture and chattel mortgage, money advanced by RFC under the loan was placed in the construction fund. The trust fund came from the earnings of the dredge and was the fund from which RFC received what repayments were forthcoming. The reference in paragraph 6 of Mr. Kelly's affidavit to the trust fund is correct for that reason. The Kelly affidavit also shows what happened to the \$40,000 which Johnson asserts it was offered and refused to take in September, 1938. The money was spent by Tuolumne for certain repairs and corrections which Tuolumne felt was necessary in the dredge.

Thus, no material or genuine issue of fact is raised by any of the affidavits. The basis for summary judgment is that upon admitted or established facts the moving party is entitled to prevail as a matter of law, or that the adversary has no valid claim for relief. When the only real conflict relates to what legal conclusions should be drawn, or whether some rule of law precludes litigation, summary judgment lies. See 3 Barron & Holtzoff, Federal Practice and Procedure, Sec. 1231.

Johnson reiterates throughout the brief that there is an issue of fact, but we have been unable to find any in the affidavits filed in opposition or in any other part of the record. What this litigation is really concerned with is the legal conclusion to be drawn from the undisputed facts before the Court. Reduction of the case to that question is all that is necessary to give a court power to grant a summary judgment. For that reason it is unnecessary to discuss in detail the many authorities cited by Johnson on the power of a trial court to grant summary judgment. This case meets the tests.

RFC WAS ENTITLED TO SUMMARY JUDGMENT ON JOHNSON'S FIRST CAUSE OF COUNTERCLAIM

In the portion of the Johnson brief devoted to a discussion of its first cause of counterclaim an effort has been made to demonstrate that it has a valid claim for a "first lien." The District Court ruled against Johnson on this claim because the statute of limitations had run, but the ruling of the Court can be upheld on the additional ground, which we are not precluded from showing, that the claim has no validity even when considered "on the merits."

(a) The indenture and chattel mortgage is not a contract for the benefit of a third party.

The essential allegations of the first cause of counterclaim are that RFC and Tuolumne entered into a contract entitled "Indenture and Chattel Mortgage," that Johnson and Tuolumne contracted together in another agreement for the construction of a dredge, that RFC loaned Tuolumne money under the indenture, that Johnson built the dredge but was not paid in full, and that RFC advanced its loan to Tuolumne but did not compel Tuolumne to pay Johnson all that was claimed to be due under the construction contract. Thereafter Johnson obtained a judgment against Tuolumne in actions to which neither RFC nor the trustee under the indenture was a party, which judgment has not been paid.

The Court has the two instruments before it. They plainly show on their faces that Johnson was not a party to the indenture and RFC was not a party to the construction contract. The construction contract provided, however, in Article II that the parties there-to would be bound by the terms of the indenture and chattel mortgage.

The relative time of the events is of some importance. The indenture and chattel mortgage and the construction contract were both executed on May 11, 1937. The Johnson-Tuolumne con-

tract provided, however, that it should not be binding until the first disbursement by RFC under its indenture and chattel mortgage should be received by Tuolumne. (See Article XVI of the contract, Exhibit "D" attached to the Statement of Facts, Tr. 205.) Funds were advanced on June 11, 1937, and the construction contract then became binding for the first time.

The dredge was built during the year following. Delivery of the dredge by Johnson to Tuolumne became final about September 20, 1937, (paragraph VII of the counterclaim), and under the construction contract the final payment was due on the same date. Receipt of the final advancement of funds by RFC to Tuolumne under the indenture occurred on September 24, 1938.

The action by Johnson against Tuolumne in the Superior Court was commenced on March 14, 1939. Judgment was obtained by Johnson in that action on March 1, 1940.

The legal theory of the first counterclaim is that the indenture and chattel mortgage is a third-party beneficiary contract, with Johnson the beneficiary, but the document in question is simply not subject to such a distorted interpretation. It is a complete and unambiguous written document whose meaning can be readily determined within its four corners. It is not subject to variance by parol evidence. Where a written instrument on which a cause of action is founded is pleaded in *haec verba*, construction is controlled by its terms and not by any allegation as to its legal effect. *Faltz v. First Trust and Savings Bank of Pasadena*, 86 C.A. 2d 59, 194 P.2d 135. Where the evidence is a written document, not qualified by testimony, the legal effect of the document is a question of law. *Meyer v. State Board*, 42 A.C.A. 425.

The rule Johnson wishes to invoke is set forth in California Civil Code Section 1559:

"A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

The key to the doctrine is in the word "expressly." The cases are legion which hold that a merely incidental beneficiary may not enforce a contract. For example, *Chamberlain v. City of Los Angeles*, 92 C.A. 2d 330, 206 P.2d 661; *Sheppard v. Banner Food Products, Inc.*, 78 C.A. 2d 808, 178 P.2d 455; *Steinberg v. Buchman*, 73 C.A. 2d 605, 167 P.2d 207.

From the agreement itself the District Court and this Court can determine whether the parties to the mortgage expressly intended their agreement to be for Johnson's benefit. Copies are before the Court as Exhibit "A" of both the complaint and the Agreed Statement of Facts. (Tr. 17-69)

This document, about 20 pages in length in the original and 52 pages in the transcript, never once mentions Johnson. It provides a multitude of details safeguarding the rights and remedies of the RFC as the lender of money and limiting the rights of Tuolumne, the borrower. None of these matters can be reasonably construed as other than for the benefit of RFC.

The factual recital in the second paragraph of the first page (Tr. 17) concerning authorization of the loan may be what Johnson conceives to be a promise to him for it mentions a gold dredge, but it also mentions building dams, caring for water level, tailings and overflow water, paying interest on the loan during construction, and, more important, providing working capital. The variety of those items is such that, if Johnson was intended by them to be a beneficiary, so was every other creditor of Tuolumne—a manifest absurdity.

Johnson might be resting its claim on the provisions of Article II, which permitted RFC to certify to the trustee under the indenture that it was necessary or desirable to make payments of specified expenses or obligations. The defects in this interpretation are that the power of RFC is discretionary, not mandatory, and that it is not directed to Johnson's benefit any more than any other possible creditor of Tuolumne in connection with the matter. The

reserved power was for RFC's own benefit; it was not obligatory. It was of a nature similar to the power retained by the municipality in *Crane v. City of Ukiah*, 110 C.A. 2d 640, 243 P.2d 582. The retention of such a power does not make a claimant a beneficiary of the contract.

The purpose of Article II was to provide a constant check on the construction fund. It provided a means for accounting for the money loaned. The veto power of the lender enabled it to make certain that the fund was used in a manner desirable to it in order to protect its security. Nothing required the lender to see that the borrower paid all its creditors. The real intent of the parties is consistent throughout: protection of the lender. Nowhere does it indicate promises for the benefit of any creditor but the RFC.

Johnson can find even less comfort in the other articles. Article I provides for notes payable to RFC. Article III obligates Tuolumne to take proper care of the trust property, to pay expenses of RFC and to protect its interests. Nothing in those articles relates even remotely to an obligation to Johnson. Article IV provides for trust and sinking funds—both to become part of the trust estate and security for the notes of RFC and to provide the means of repayment to RFC—not Johnson or anyone else. Article V defines events of default and provides remedies to RFC as the holder of the notes. Article VI sets forth the duties and powers of the trustee, none of which refer to any creditor but RFC. The sundry provisions of Article VII are also concerned with the protection of the rights of RFC.

Out of this lengthy document, carefully detailed with provisions defining and protecting the rights of RFC, no intent of the parties can be found to enter into promises for the express benefit of Johnson. It is the lender that this document is intended to benefit, not a third party having a contract with the borrower. Nothing indicates an obligation of the lender to require the borrower to

pay someone else before itself, to use the remedies on default for the benefit of another or in any other way to look out for any interest but its own.

The plain terms of the instrument show the purposes of the parties, and references outside the writing are neither necessary nor permissible. The obligations undertaken only to each other, guarding against risks to themselves alone and protecting the interests of themselves alone, make any benefit to a third party purely incidental.

Payment to Johnson is nowhere specified in the indenture. Payment to that company is set forth at length as to amounts, terms and conditions of payment in a separate document to which RFC was not a party and which was not even binding on Johnson until RFC had made its first advance under the indenture and mortgage. It is wholly unreasonable to believe that so important an agreement as to pay a third party over half a million dollars would never be expressed by way of direct promise or covenant.

The relationship of the RFC and Tuolumne and Tuolumne's contractors has been reenacted hundreds of times when lenders have loaned money to borrowers who intended to build buildings and who have given mortgages or deeds of trust covering the real property, including the intended buildings, as security for the loan. Tuolumne intended to build a large chattel rather than a building, but it gave a trust indenture and chattel mortgage covering both its real property and all of its chattels and intangible property, in the same manner as those intending to construct buildings which become a part of the realty. The relationship between the RFC, Tuolumne and its contractors, was the same as in *Smith v. Anglo-California Trust Co.*, 205 Cal. 496, 271 P. 898, where the court found that the fact that the borrower intended to use the loan to construct a building did not make the building contractor a third-party beneficiary of the loan agreement.

The construction of such agreements simply boils down to the indisputable conclusion that the lender and borrower in such a situation have the principal intention of incurring mutual obligations for the benefit of each other, and the fact that someone else may, by virtue of an independent contract with the borrower, be paid out of the loan funds is a mere incident to the principal purpose. In those situations the contractor has no right to recover as a beneficiary under the loan contract. As decided in the *Smith* case, before a third party who may derive a benefit from a promise is entitled to bring an action thereon, there must be an intent *clearly manifested* by the promisor to secure the benefit claimed by the third party. The indenture and chattel mortgage here makes no such clear manifestation of an intent to benefit Johnson and therefore no recovery may be had on the theory of the first cause of counterclaim.

The authorities cited in this part of appellant's brief do not establish its theory. In *Knox v. Kaelber*, 140 N.J. Eq. 474, 55 A.2d 53, there was proof of fraudulent conduct in sale of the mortgaged property for which reason the mortgagee was estopped from asserting a priority, an obviously distinguishing factor. In *Mitchell v. West End Park Co.*, 171 Ga. 878, 156 S.E. 888, a materialman furnished building materials after recordation of a deed as security for a loan and the lien of the lender was held to be prior. The case supports RFC, not Johnson.

In *Northwestern Trust, etc. v. Kessler*, 66 N.D. 737, 268 N.W. 692, a materialman furnished building materials *before* the recordation of the mortgage securing the loan. He could have had a prior lien (something that Johnson could not have had because the indenture and mortgage was recorded first). The lender induced the materialman not to protect himself and was therefore estopped. Similarly, in *Title Guarantee etc. Bk. v. Clifton etc. Bk.*, 149 Va. 168, 140 S.E. 272, one party obtained a beneficial agreement from the other with an understanding of the latter's priority

and then induced it not to enforce the lien promptly. In both cases the complaining party had a valid prior lien to start with. Johnson never had a prior lien and never had a valid lien, except insofar as it may be assignee of the liens of those who protected their mechanics' liens in a timely manner.

Wichita etc. Assn., v. Jones, 155 Kan. 821, 130 P.2d 556, also deals with a factual situation similar to *Smith v. Anglo-California Trust Co.*, *supra*. Mechanics' liens had been perfected and the lender had failed to advance the entire loan. The court said (130 P.2d 559):

"* * * [O]f course if the loan had been fully paid, but the materialman had not, they would not have been entitled for the appellant would have been fully performed."

(b) Action by a third party beneficiary is barred by the statute of limitations in the same way as action on any other type of contract.

The facts show that on September 24, 1938, RFC made the final disbursement of the sum loaned under the indenture and chattel mortgage dated May 11, 1937. The date of that disbursement is immediately after the date Johnson claimed (and still does) that the dredge was finally delivered and its final payment was due. That date, then, was the date when Johnson could have brought suit.* Johnson delayed, however, until June 22, 1950, nearly twelve years.

It cannot be denied that Johnson was not aware of the breach of contract, if any there were. It brought suit promptly against Tuolumne for the money asserted to be due under the construction contract, the same money which it now asserts is due it as a third-party beneficiary of the indenture and chattel mortgage.

Assuming, *arguendo*, that the mortgage was intended by the

*It is also the date from which Johnson figures interest. We are unable to reconcile Johnson's claim that the alleged obligation of RFC arose in 1949 with the claim of interest from 1938.

parties to it to be a contract for Johnson's benefit, the right of action is subject to the same disabilities due to passage of time as the right of any other promisee under any other contract.

Johnson had to commence his action on the written contract within six years after his rights accrued, under Title 28 U.S.C. Section 2401(a).^{*} The fact that Johnson pursued an action against Tuolumne is immaterial, for, if Johnson had a right against RFC, it was not conditioned upon exhausting a remedy against Tuolumne. A third party beneficiary is entitled to maintain his own action directly against the promisee and is barred if the action is not commenced within the period allowed by law. *Bogert v. George K. Porter Co.*, 193 Cal. 197, 61 P. 1107; *Pitzer v. Wedel*, 73 C.A.2d 86, 165 P.2d 971.

Johnson does not argue only that the statute of limitations has not run. It repeatedly and vigorously asserts that the RFC "waived and was estopped to assert" the defense. That argument will be discussed later. The facts do not support it. There has been no showing that anyone having legal authority acted for the government in such a way as to result in either waiver or estoppel.

Johnson claims that the statute of limitations is inapplicable. This claim is based upon a misconstruction of *Holmberg v. Armbrecht*, 327 U.S. 392. In that case there was not the simple distinction between the enforcement of legal and equitable rights that Johnson suggests. The equitable doctrine of laches was applied rather than the rule of the statute of limitations because the right sought to be enforced arose not from state law but from section 16 of the Federal Farm Loan Act. Since the action was

^{*}"§ 2401. *Time for commencing action against United States* (a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases."

brought in the federal court on a claim arising from federal law the state statute of limitations had no application. There was no applicable federal statute of limitations. Therefore the only possible defense based upon the passage of time was the doctrine of laches.

The court said at page 395 that if Congress explicitly put a limit upon the time for enforcing a right which it created that would be the end of the matter. The Congressional statute of limitations would be definitive. Such is the case before the Court.

Johnson does not sue, as did the plaintiffs in the *Holmberg* case, upon a federally created right, the sole remedy for which lay in equity. Stripped to its essentials, Johnson is simply suing on an action at law as a third party beneficiary of a contract. Everything else it complains of is merely secondary and remedial. The case is not similar to the *Holmberg* case, but to *Guaranty Trust Co. v. York*, 326 U.S. 99, which was distinguished and not overruled by the *Holmberg* case. Johnson sues on a state-created right for which the remedy is at law, which remedy is subject to a federally-created statute of limitations. Johnson relies throughout on state law in determining the origin and nature of its claims, and the District Court did likewise. There is no body of substantive federal law governing the claims, but the remedy in the Federal Court is governed by the federal statute of limitations. It is procedural and was properly relied on by the District Court. Unlike the *Holmberg* case, where Congress left the formulation of remedial details to the courts, in this case Congress has enacted an applicable statute of limitations.

RFC WAS ENTITLED TO SUMMARY JUDGMENT ON JOHNSON'S SECOND CAUSE OF COUNTERCLAIM.

The District Court found that any lien Johnson may have had was waived and, if there had been a lien, it would be barred

by the statute of limitations. A lien is merely accessory to a personal obligation and is barred by the same statute of limitations as the obligation itself. We rely on the authority cited by the District Court.

(a) There is no basis for an equitable lien.

In Johnson's second cause of counterclaim it is alleged that it is entitled to a lien superior and senior to any lien of the plaintiff against the property of Tuolumne. The evidence before the Court conclusively shows that, if Johnson had any lien at all, it was junior and subordinate to the lien of the RFC, which was created by the original indenture and chattel mortgage. The priority of the RFC lien is demonstrable on several grounds. In addition, while the Johnson lien, if any, was becoming barred by the statute of limitations, the RFC lien was kept alive by timely re-recording.

Under California Civil Code Section 2881 a lien is created by contract of the parties or by operation of law. The evidence negatives a contractual lien existing in Johnson's favor, so a lien must arise by operation of law, if at all.

The appellant has difficulty in classifying its purported lien and therefore states: "It is predicated upon equitable rules of estoppel, upon the maxim that he who seeks equity must do equity, upon the doctrine of unjust enrichment and upon elemental principles of equity and good conscience." (Brief, p. 37)

From this description it can be determined that the alleged lien is neither statutory nor common law in origin and is none of the known legal liens. It is only an equitable remedy that appellant desires to have imposed. Appellant overlooks the fact that an equitable remedy is available only to protect some pre-existent right (either to obtain money damages or to subject property to a charge). The remedy of an equitable lien is a procedural creature of a court of equity, but the right upon which it is

predicated is not. An equitable lien, like a constructive trust, is a remedial measure to protect a right which existed independently of and prior to any decree of court and which could be protected effectively only by the imposition of a lien or trust by a decree of court. The right must relate, as a charge, to some specific property and the court can charge only that property with an equitable lien. See Pomeroy's Equity Jurisprudence, 5th Ed., Vol. 1, §§ 165-167, and Scott on Trusts, Vol. 3, § 463.

Johnson must show that it has a right to charge the former property of Tuolumne and that the right can be protected effectively only by the imposition of an equitable lien. Otherwise summary judgment on the second cause of counterclaim was entirely proper.

Appellant finds no possibility on which to base its claim for a lien except in the financing arrangements by the RFC and Tuolumne, which provided for a construction fund to be used for the purchase of a dredge and for other purposes, including use as working capital. Any claim of lien was limited to that particular fund. It was the only property which Johnson's construction contract related to, against which its claim for payment could have been a charge.

Reliance is placed on *Wichita, etc. v. Jones, supra*, which is consistent with the California cases. The court did not recognize any right in the building contractor except in relation to the *building fund* which the lender was required to furnish, *whether the builder received it or not*. The court did not purport to establish a rule that the lender was obligated to see that the builder received his money from the loan fund. All the lender had to do was furnish the money to the borrower.

The law of California on the subject also clearly excludes the present case from the equitable lien theory. The remedy of an equitable lien will be imposed under California law only on a construction fund. If a lender has withheld money which it agreed

to advance to such fund, the court will require the lender to advance the amount of the loan, but no more. RFC has already done that and the money has been expended by Tuolumne. There has been nothing left in the construction fund upon which to impose an equitable lien for 10 years before Johnson filed its counterclaim.

The applicable principles of law are to be found in *Smith v. Anglo American California Trust Co.*, supra; *Pacific Ready Cut Homes v. Title Ins. & Trust Co.*, 216 C. 447, 14 P.2d 510; *City Lumber Co. v. Park*, 14 C.A. 2d 431, 58 P.2d 403; and *Crescent Lumber Co. Inc. v. Borchers*, 59 C.A. 2d 318, 138 P.2d 779.

In no instance has a court required a lender to see to it that a borrower pays the contractor. The third party beneficiary theory has been specifically rejected in the *Smith* case. Without such an interpretation of the loan agreement there is no basis for such a duty. All that the lender need do is furnish the money to the borrower, which has been done. No court has required that the lender furnish more than the loan contracted for.

In the *Smith* case insolvency of the borrower occurred before the last portion of the loan funds had been disbursed by the borrower from the building loan account which the lender had established for it. The borrower's administrator attempted to recover the amount of the loan not paid out. The lender then did the logical thing and sought to retain the remaining \$4,000 of the loan, asserting a right to apply it against the principal debt. The builders claimed liens against the real property. Those liens were junior to the encumbrance of the lender because work was commenced after recordation of its encumbrance. The builders also asserted a lien against the \$4,000, the unexpended portion of the building loan account or construction fund.

The court found that the debt owed to the lender was secured by a lien on the property prior to any lien of the builders and that the lender's obligation to advance the total amount of the loan still existed despite the insolvency of the borrower. The remaining

funds in the construction fund held by the lender could not be withheld from the borrower, who would in turn be obliged to use them for payment to the builders. Under the circumstances, the funds still in the construction fund were subjected to an equitable lien in favor of the builders. *No other property was subject to a lien and the prior lien of the lender on the property of the borrower was protected.*

The justification for the holding was that the lender had a duty to advance the full loan and would be unjustly enriched if it did not do so; the builders had fulfilled their obligations to the borrower and had filed timely lien claims; and the lender had its prior lien upon the property of the borrower, as improved by the builders, upon which it had relied in making the loan agreement. The borrower, although insolvent, received performance of the loan agreement, subject, however, to the charge of the builders against the remainder of the building fund. As mentioned above, the Court specifically rejected the theory that the builders were third party beneficiaries of the loan agreement.

The *Pacific Ready Cut Homes* case was decided upon precisely the same theory.

The material differences of the present case are readily apparent. Here the loan was not withheld from the borrower. It was advanced in the required time and manner to the construction fund. The loan or construction fund, the only item which could be subjected to an equitable lien under the *Smith* case, was advanced to Tuolumne in accordance with the terms of the indenture and chattel mortgage, the last portion thereof on or about September 24, 1938. There is no existing balance of the loan yet unadvanced to which an equitable lien can apply. It was expended by Tuolumne about 10 years before Johnson filed its counterclaim.

The *Smith* and *Pacific Ready Cut Homes* cases do not stand for the proposition that a prior lien can be imposed on the property itself, which is what Johnson is attempting to establish here.

Neither are they authority for so-called tracing. Neither do they stand for the proposition that the lender must advance any amount over and above the agreed loan in order to pay off a builder to whom the borrower still owes money, yet that is the inevitable result of the claims of Johnson in this case.

Even on the equitable lien theory Johnson's claim is limited to that of a subrogee or assignee under the doctrine established by the *Smith* case. The court did not permit equitable liens in favor of anyone who had failed, as Johnson did, to meet the statutory requirements for a legal lien by timely filing of a claim for a mechanic's lien.

In *City Lumber Co. v. Park*, supra, it is emphasized that in all the equitable lien cases such liens were enforced in favor of holders of mechanic's liens who had taken the necessary statutory steps to perfect such liens. It is also pointed out that the whole line of cases stemming from the *Smith* case involved actions to subject the *unexpended balance of a building loan* to an equitable lien in favor of the holders of mechanic's liens which had become worthless due to the amount of prior encumbrances. Where the construction fund has been entirely expended, there is nothing to which an equitable lien can attach.

In a case where the unexpended portion of such fund was paid, after the completion of a building, to one of several lien claimants, action was brought by one such claimant against another who received the money, in an attempt to have an equitable lien impressed on the funds. The court held that there was no theory upon which the plaintiff was entitled to relief. *Crescent Lumber Co., Inc. v. Borchers*, supra. No existing balance of unexpended fund was in existence upon which equity might have imposed the lien and *tracing was not allowed*. Although one lien claimant received the entire balance of the loan fund in existence at the time of completion of the building, paying off his claim almost in its entirety, and the plaintiff received nothing, the court found there

was no unjust enrichment. The case presented to the court was even stronger than Johnson's claim for Johnson seeks to compel the *lender* to repeat part of the loan.

The plaintiff in the *Crescent Lumber* case relied on the *Smith* case, but the court said (59 C.A. 2d at 321):

"From what has already been said, it is apparent that the facts in the case are clearly distinguishable. Furthermore, as pointed out in a more recent case, the *Smith* case and similar cases are based upon the proposition that an equitable lien should be imposed under certain circumstances to prevent 'unjust enrichment' of one of the parties to the litigation; and it is said that when there is no unjust enrichment, 'The rule as to equitable liens should not be enlarged and extended * * *' (*Mortgage Guar. Co. v. Hammond Lumber Co.*, 13 Cal. App. 2d 538, 544 [57 P.2d 164.].) There is no element of unjust enrichment appearing here and there is no existing balance in any unexpended fund upon which equity may impose a lien. The trial court, in attempting to apply the equitable lien theory of the *Smith* case, entered an ordinary money judgment against all defendants, including the title company, but we find no theory under the agreed facts upon which plaintiff could be entitled to any relief against any of the defendants."

To sum up the equitable lien theory, it can be said that it is limited to those rare situations where persons who have complied with the requirements for statutory mechanic's liens have brought timely actions to enforce equitable liens against the balance retained in construction funds and not expended prior to the commencement of the action. In those cases the balance of unexpended loan funds only, and not the property itself, may be subjected to a lien, where not to do so will result in unjust enrichment. To state the proposition is to exclude Johnson's claim. There is neither an unexpended loan fund nor unjust enrichment in this case.

The real result sought by Johnson is either to have a lien impressed upon the dredge or the real property itself, not on the un-

expended loan fund, in a manner unauthorized by statute or judicial authority, or else to subject RFC to damages in a manner equally without legal authority.

Appellant argues that it was induced to forego any lien on the dredge. In reality Johnson gave up nothing, so far as the priority of the RFC loan was concerned. Johnson could not have acquired a prior lien under any interpretation of the facts. The lien of a trust deed, mortgage or other encumbrance recorded prior to the commencement of the work on an improvement is a superior lien unless the seniority is specifically waived by the lienee. See *Barr Lumber Co. v. Shaffer*, 108 C.A. 2d 14, 238 P. 99; *San Pedro Lumber Co. v. Wilson*, 4 C.A. 2d 41, 40 P.2d 645. The facts are clear in this case that Johnson has no claim to priority. Recordation of the RFC indenture and chattel mortgage occurred on June 2, 1937. (Tr. 179) Work commenced in about December, 1937. (Tr. 328)

If Johnson is the subrogee of legitimate lien claimants who complied with the statutory requirements, the lien or liens it claims as subrogee are inferior to that of RFC due to the rule that a mechanic's lien is junior to a prior trust deed when neither the trustee nor the beneficiary under the trust deed is joined in the foreclosure action within the period required by California Code of Civil Procedure 1181 et seq. This would be true even if the mechanic's lien would have been senior, but for the failure to join the beneficiary or trustee. In other words, the period of limitations contained in the mechanic's lien statute (C.C.P. 1181 et seq.) is a statute of limitations barring mechanic's liens in respect to the rights of parties not joined in the foreclosure action in a timely manner. *Paramount Securities Co. v. Daze*, 128 C.A. 515. When this rule and that of the *Smith* case are considered together, it becomes clear that Johnson's purported equitable lien by subrogation is junior to the RFC lien because of the failure to join RFC in the suit against Tuolumne. The *Smith* case makes an equitable

lien dependent upon a mechanic's lien and the *Paramount* case holds that such a lien may be established only by joining other parties after compliance with the statute.

Even aside from the provision in the construction contract, under which Johnson agreed to be bound by the indenture and mortgage including its provision establishing a first and prior lien in favor of RFC, Johnson could not have acquired a *prior* lien. The only lien on the Tuolumne property it could have gotten would have been a mechanic's lien, junior to the RFC lien. It was not induced to forego such a lien on the dredge, for it would have been entitled to a mechanic's lien by operation of law had it gone to the trouble required to file a notice of claim of lien as its subcontractors did. The best that Johnson can claim now is that it is the subrogee of junior mechanic's liens acquired by its subcontractors. It is stated in Mr. Johnson's affidavit (Tr. 216-17) that "the lien claimants have been fully paid and Johnson Company is now subrogated to all of their rights under the judgment." We must assume from that that the mechanic's liens of the subcontractors, which became merged in their judgments against Tuolumne and became judgment liens, have been acquired by Johnson. Whether the liens date from the judgment or from the date the original notices of claims of lien were filed, the liens are subsequent in time and subsequent in priority to the lien of the RFC. Those liens were wiped out by the judgment entered on the RFC complaint, from which Johnson has not appealed, and no claim could possibly be based on them at this time.

Cases cited by Johnson do not detract from the analysis made herein. In *Theatre Realty Co. v. Aronberg Fried Co. Inc.*, 85 F.2d 383 (C.A. 8, 1936) the court imposed an equitable lien on the unexpended balance of the loan fund only, not on the debtor's property. Similarly in *San Mateo P. M. Co. v. Davenport R. Co.*, 218 C. 702, the builder was allowed to recover only against the loan fund and no recovery was allowed in excess of that fund after

it was exhausted. The acceptance by the lender of certain orders, with a guarantee of payment, was tantamount to a novation.

In *Whiting-Mead Co. v. West Coast B. & M. Co.*, 66 C.A. 2d 460, 152 P.2d 629, the court held that the unexpended balance of a construction fund should be paid pro rata to mechanics and materialmen, to the exclusion of general creditors. The case differs from the *Smith* decision only in that the court did not make valid liens a prerequisite for participation. The case does not hold that a lender undertakes an obligation to see that the builders are paid. The *Wichita etc. Assn.* case has already been discussed.

Johnson has cited some cases which establish that equitable liens are within the remedial powers of a court. This is undeniable. Johnson misses the fundamental premise, however. Equitable liens are merely remedial devices. There must be a preexistent right in or to or against certain property, which right has been pursued in a timely manner before the remedy will be used by a court. Johnson is unable to show such a right. One of the cases it cites, *Security Fed. S. & L. Assn. v. Undersood C. & S. Co.*, 245 Ala. 56, 16 So. 2d 100, holds that a lender has no implied obligation to see that the borrower uses the loan fund to pay mechanics and materialmen.

In *Anderson Inv. Co. v. Jones*, 104 Wash. 142, 176 P. 17, lien claimants were entitled to priority over a second mortgage only because the lender had failed to advance all the loan. The case is not authoritative here for RFC did advance all of its loan.

Johnson speaks of transfer of the construction fund by RFC to third parties. The agreed facts are that RFC advanced the funds to Tuolumne. Tuolumne then used them, as it was entitled to do, for working capital. There was no guaranty or suretyship by RFC, as the indenture and mortgage plainly show. Cases relating to such relationships are irrelevant.

Other cases cited on the general theory need not be discussed. They do not vary the principles which we have shown exclude Johnson's claim.

Certain cases on unjust enrichment are also cited. Without exception the cases involve the obligation of a person directly benefited by retention of another's property to make payment for it. Where a benefit has been bestowed in connection with particular property, equity has imposed a lien upon that property, but it does not impose an obligation upon a third party who is only incidentally benefited. The contracts of RFC and Tuolumne and of Tuolumne and Johnson were mutually exclusive and left no room for the implication of any obligation of RFC to Johnson. Finally, restitution is required only where the person sought to be charged received property belonging to the claimant. The only property in which Johnson might have had an interest was the construction fund. RFC did not receive it and Tuolumne paid other creditors with it in using it as working capital. RFC received nothing in which Johnson had a beneficial interest, which a court can require RFC to restore.

(b) Johnson is barred by lapse of time.

Johnson's claims are so nebulous that assumptions of several possibilities have been made in order to dispose of them, but, whatever the type of lien depended on, the obligation to which it is accessory is barred and therefore the lien itself is barred. Johnson could have had a junior lien as the subrogee of the mechanic's lien claimants but a junior lien is of no value. Johnson must show a senior lien or it has nothing. In order to achieve this it has claimed a redemial lien upon the basis of certain ponderous maxims.

We have shown that the type of lien claimed does not result from the operation of these maxims but depends on factual situations, into the pattern of which Johnson cannot bring itself. Nevertheless, if we assume for the purpose of argument that Johnson has a legitimate claim to a lien, action to enforce the obligation to which the lien is accessory was brought too late.

Whether the alleged lien be legal or equitable, it is merely

"* * * accessory to the act, for the performance of which it is security, whether any person is bound for such performance or not, and is extinguishable in like manner with any other accessory obligation." California Civil Code Section 2909.

"A lien is extinguished by the lapse of time within which, under provisions of the Code of Civil Procedure * * * an action can be brought upon the principal obligation * * *." California Civil Code Section 2911.

The next logical inquiry is the determination of the act to which the alleged lien is accessory. If the basis upon which Johnson asserts the lien is an obligation of Tuolumne, it impliedly admits that Johnson's alleged lien is not accessory to an obligation of RFC.

If the loan is accessory to an act performable by RFC to Johnson, then that act must be identified and the date of its non-performance ascertained. There has been no attempt by Johnson in the affidavits in opposition to the motions for summary judgment to show fraud on the part of RFC.

The actual expenditure of the funds complied with the requirements of the indenture. RFC did not retain any of the loan funds, but advanced them as required by its agreement to Tuolumne, which in turn had the power to use them for any of the purposes permissible under the original loan agreement.

Even if some obligation was owed directly to Johnson by RFC, to which a lien could be accessory, the property to which it would attach must be specified. There are no loan funds in RFC's possession and there are none in Tuolumne's possession. The only possibility is the property of Tuolumne, where Johnson's lien would be a secondary charge. No theory of law has yet been developed which would allow a lien in favor of Johnson to hurdle the RFC lien on that property and assume first priority.

If there were an obligation on the part of RFC to compel Tuolumne to pay Johnson the final advancement, or, failing that, for

RFC to make such payment itself, Johnson's claims are still faced with the defenses of the statute of limitations and laches. If the RFC had either a legal or equitable duty to pay Johnson itself or to compel Tuolumne to pay Johnson, the duty was breached in September, 1938, almost 12 years before the filing of Johnson's action against it. If RFC's duty were a legal duty, it is barred by the statute of limitations. Even if the statute were inapplicable, action by Johnson is barred by laches. The period of time during which an action might have been brought is almost twice that allowed by the statute of limitations. The period of the statute of limitations is customarily adopted by courts of equity and is a sufficient bar here. We need not quibble about the terminology.

This Court has decided that the statute of limitations applies to *every civil action* against the government and excludes only criminal and admiralty proceedings. See *Werner v. U. S.*, 188 F.2d 266, 268 (C.A. 9, 1951). Since the principal obligation, whatever it may have been, is barred, any lien accessory to it is extinguished.

Where a principal obligation is barred by the statute of limitations, equity cannot declare and enforce an equitable lien. *Beal v. United Properties Co.*, 46 C.A. 287, 298, 189 P. 346.

Johnson's nebulous claims can certainly not place it in any stronger position than a party holding a deed of trust. In a controversy between one holding a second deed of trust and one holding a first deed of trust, the holder of the second deed of trust has a right to plead the statute of limitations as against the notes secured by the first deed of trust. *Flack v. Boland*, 11 C.2d 103, 77 P.2d 1090. The statute not only bars the action on the debt but also deprives the mortgagee of the right to enforce the lien of his mortgage, under California Civil Code Section 2911. Therefore, even if Johnson had a lien, the statute of limitations prevents the enforcement of it.

RFC WAS ENTITLED TO JUDGMENT ON JOHNSON'S THIRD CAUSE OF COUNTERCLAIM

Johnson's third cause of counterclaim is based upon the same facts as the first two, but the theory is changed somewhat, it being alleged here that the RFC has been unjustly enriched in the amounts claimed to be due Johnson in that the RFC received the proceeds of the operation of the dredge by Tuolumne. It is also alleged that plaintiff received such amounts as trustee for the benefit of Johnson.

The facts show that the RFC did receive amounts from Tuolumne from its income in operating the dredge. Those funds were paid to RFC in exactly the manner required by the original indenture and chattel mortgage. The source of the funds—profits of Tuolumne operations—was that contemplated for repayment of the RFC loans. The funds were not, as in the *Smith* and *Pacific Ready Cut Homes* cases, the original loan funds which the lender was trying to retrieve before the borrower had expended them to the contractors. Amounts paid to the RFC from Tuolumne's income went through the trust fund under the indenture according to the plan well known to Johnson before it entered into contract with Tuolumne. Johnson seems to overlook the fact that it knew from the outset that the indenture and mortgage contemplated a self-liquidating project, i.e., that the loan was to be paid from earnings.

The first topic heading in Part IV of appellant's brief states a proposition which is obviously distinguishable from the present case. It is true that an unpaid contractor who has relied on a construction loan for payment may have an equitable lien on the fund, but when the fund is gone there is nothing against which the lien can be a charge. Appellant further asserts that a lender who diverts part of the fund to other uses than the payment to the contractor is to that extent liable to the contractor personally. The latter assertion is constantly reiterated, but we are unable to find any basis for

an obligation on the part of RFC to compel Tuolumne to pay Johnson. Neither legal authority nor the facts support it.

We mention in passing that in its discussion of this part of the counterclaim Johnson reiterates the fallacious argument that the District Court erroneously decided against it "on the merits," as though that action were beyond the Court's power under Rule 56. The *Suckow Borax* case disposes of this contention.

The argument in favor of the third cause of counterclaim is founded upon a basic misconception, i.e., that the construction fund and the earnings of the dredge (trust fund) were the same. The fallacy of the assumption is demonstrable by the simple expedient of reading the indenture and chattel mortgage. Two funds are provided for in that document. The first, the construction fund, was created from the RFC loan. (Article II, Tr. 38-9) It had various uses including, but not limited to, payment for the dredge and use as working capital. If Johnson had any claim of a lien or charge, the *construction fund* was the only property against which such lien or charge could exist.

A second fund, known as the trust fund, was created from the earnings of the dredge. (Article IV, Tr. 47-9) Its main purpose was to provide funds for the sinking fund (Tr. 49-50) which was to be used for payment of principal and interest due RFC. In addition the trust fund was also usable as working capital. Johnson had no special claim of any kind on the trust fund. It was simply a general creditor. No authority has been found which would permit a court to give an unpaid contractor any special right in the trust fund. In all of the cases cited in the Johnson brief and all of those which have come to the attention of counsel for the RFC, in which contractors have been given equitable liens or special rights, such liens or rights have been limited in every case to the unexpended balance of the construction or loan fund. In some instances lenders have been compelled to perform in full the loan agreement, where the loan has not been entirely advanced, but no

lender has been compelled to furnish additional sums and in no case have the earnings of the borrower been subjected to a lien.

Once the construction fund and the trust fund are distinguished Johnson has nothing left to argue about. Its argument is compounded from the confusion of the two funds. Johnson first erroneously assumes that the construction fund was dedicated to it alone and that RFC had undertaken an obligation to it, as a third party beneficiary, to see that the money was used in no other way. We have already disposed of that contention. Johnson next assumes that a special interest in the nature of an equitable lien, which it may have had against the construction fund, can be transferred to other property such as the earnings of the dredge. Neither the terms of the indenture nor any principle of law permits this.

Assuming Johnson had an equitable lien, it was a charge against the construction fund only. Once the fund was gone, the charge against it was gone also. Johnson might have protected its lien had it pursued proper remedies in a timely manner. It would have been a simple matter in its action against Tuolumne in the state court to use some ancillary process, such as a restraining order, an attachment or a receivership to maintain the construction fund intact. It neglected to do so, leaving Tuolumne free to use the construction fund as working capital. Johnson was aware of such use not later than January, 1943. (Tr. 154) It knew of the work on the dredge by another company in 1939. (Tr. 412-13) Despite that knowledge Johnson took no action and Tuolumne expended the fund in the course of its operations. Johnson became only a general creditor. In the present action Johnson seeks to have the Court remedy its error in judgment of 10 or 15 years ago.

(a) RFC received no money or property to which Johnson was entitled, so no unjust enrichment resulted.

Unjust enrichment is a phrase of little meaning unless it be connected to a situation in which benefits, to which the claimant

would have been entitled, are conferred by mistake, fraud, coercion or request upon the benefited party.* The facts here plainly show that no benefit was conferred by Johnson upon RFC under any of those circumstances. Payment of RFC by Tuolumne of amounts out of its income was not a conferring of a benefit to which Johnson was entitled for the simple reason that it was not Johnson's money which was paid to the RFC. Neither was it money from the construction fund. Tuolumne paid its own money, as it was entitled to do and as it was required to do under the indenture. Unless the money paid by Tuolumne was Johnson's money, RFC could not have received anything belonging to Johnson.

A constructive trust may be imposed only to prevent unjust enrichment where one person wrongly acquires property of another. Where there is no unjust deprivation of the claimant and no corresponding unjust retention of the claimant's property by the other party, no constructive trust may be imposed. A constructive trust is simply a remedy provided by a court of equity where those special circumstances appear. The assertion in Johnson's pleading that RFC received funds as trustee for the benefit of Johnson simply states Johnson's legal conclusion that the court ought to invoke such a remedy. There is obviously no express trust involved in this matter.

Unless some property of Johnson's was held by Tuolumne and by it delivered to RFC, Johnson is merely a creditor of Tuolumne. And no constructive trust may be imposed for the benefit of an ordinary creditor. Johnson must show, and the facts demonstrate that it cannot show, that it owned a beneficial interest in the income or other property of Tuolumne.

If Johnson has a remedy at law against either Tuolumne or RFC, no constructive trust could be imposed, for equity will not act in that

*[Involuntary trust resulting from fraud, mistake, etc.] One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." California Civil Code § 2224.

manner if an adequate legal remedy exists. The adequacy of a legal remedy is to be measured in each case by the rights of the claimant and not by the possibilities of recovery. A constructive trust will not be imposed merely because, owing to the insolvency of the debtor, the recovery at law will be inadequate. The uncollectibility of Johnson's judgment against Tuolumne furnishes no reason for equity to create a constructive trust.

Johnson's theory in the third cause of counterclaim has to be based upon the premise that it had a beneficial interest in the property of Tuolumne. We have shown that there is no basis for an interest by way of a contractual promise or a lien on Tuolumne's property generally. However, assuming at this point that Johnson had brought a timely action to enforce an equitable lien, such a lien would be limited to the unexpended portion of the loan funds. It is impossible to impose one now, for there is no such unexpended portion in existence. It was used by Tuolumne in the payment of other debts than that of RFC ten years or more before Johnson's present action.

The theory relied on here is apparently that of *Whiting-Mead Company v. West Coast Bond and Mortgage Company*, supra. The case represents an extension of the law stemming from *Smith v. Anglo Bank*, but on a different theory—that of a trust. By adopting the trust theory rather than the equitable lien theory in that case the Court was enabled to permit recovery of all claimants, whether or not they had perfected legal liens in the manner required by state statutes and the *Smith* case. By imposing a trust all the unpaid mechanics and materialmen were placed in the same category and shared pro rata. The important point of the decision, in its application here, is that the trust was imposed upon the *unexpended loan fund* and nothing else.

The case is no authority for imposing a trust in the present case for two reasons. First, there is no unexpended portion of the construction fund to become the trust *res*. Second, the peculiar under-

taking of the lender in the *Whiting-Mead Company* case is not matched by the indenture and chattel mortgage here. RFC did not undertake to make certain that payments from the construction fund went to contractors, but merely reserved a veto power enabling it to maintain an accounting check on the fund and to protect its own security. The power of the RFC was similar to that reserved in *Crane v. City of Ukiab*, supra, for its own benefit and not that of the third party. Also, the purpose of the loan was nowhere expressly limited to the purchase of a gold dredge. "Working capital" was one of the purposes. That is a broad phrase allowing any expense reasonably connected with the Tuolumne operation.

All that was required of RFC was payment into the construction fund. Once that occurred (September 24, 1938) there was no property of Tuolumne in the hands of RFC upon which a constructive trust could be imposed.

There is still another answer to this claim of unjust enrichment. If there were any enrichment of RFC, it could hardly be unjust as to the amounts advanced by RFC before Johnson's asserted lien arose. In other words, the first lien of RFC could, under the most extreme extension of Johnson's theories, only be reduced by the amount due Johnson under the construction contract (about \$33,000) and RFC still would have a prior lien for the \$567,000 first advanced, plus any other mandatory expenses or advances. Johnson then would be in line for a secondary lien for \$33,000, which would be followed by a further lien in favor of RFC for such \$33,000 together with any optional or additional expenses or advances which were made later. There is no authority for allowing Johnson to hurdle the prior lien of RFC for the first \$567,000 advanced. Even if there were any reasons for the arbitrary advancement of Johnson's place in the succession of liens, such an advancement is precluded by the specific agreement of Johnson in its contract with Tuolumne to be bound by the original indenture and chattel mortgage which granted RFC a prior lien. The

agreement between Johnson and Tuolumne recognizing and preserving the preferred position of the RFC was in effect a contract for the benefit of RFC.

The cases cited by Johnson agree with the general principle that constructive trusts are implied by law to prevent fraud. See *Johnson v. Clark*, 7 C.2d 529, 533 and 535. They also agree that the claimant must have had a beneficial interest in the particular property subjected to the constructive trust. Johnson has shown an inability to create an issue of fact either as to fraud or as to the existence of a beneficial interest in any property of Tuolumne. A constructive trust is imposed only for the benefit of the rightful owner of property, not for a general creditor who once had a special claim against property no longer in existence and who failed to protect itself in a timely and appropriate manner.

(b) Johnson's claim on theory of unjust enrichment is barred.

Finally, Johnson's claim against RFC, which it desires the court to protect by the use of equitable relief, is barred by the statute of limitations. Even if the primary obligation were of such nature that the statute of limitations were inapplicable, the lapse of time is still a complete defense. The statute of limitations will be applied by analogy by a court of equity. Laches, apparent herein as a matter of law, serves as a defense to this cause of counterclaim. In the case of a constructive trust the statute of limitations commences to run with the inception of the trust, i.e., the unlawful transfer by the trustee. *Easton v. Geller*, 116 C.A. 577, 3 P.2d 74; *Siem v. Hjelm*, 49 C.A. 2d 148, 121 P.2d 87; *Bell v. Bayly Bros.*, 53 C.A. 2d 149, 127 P.2d 662. If there were such an unlawful transfer, it occurred between 1938 and 1943, at least seven or eight years before the counterclaim was filed. Johnson had notice of it in 1939, when another company rebuilt the dredge, and prior to January, 1943, when it made one of its periodic proposals to RFC. (Tr. 154)

RFC WAS ENTITLED TO JUDGMENT ON JOHNSON'S FOURTH CAUSE OF COUNTERCLAIM

The facts show that in the period from July, 1940, to September, 1942, Tuolumne paid RFC \$120,000 principal and \$9,948.49 interest, pursuant to the second indenture and chattel mortgage, which had been executed on November 29, 1939. (Statement of Facts, Section 9) RFC accepted the payments and applied them in satisfaction of the debt secured by the second indenture. Johnson charges that those facts, particularly the acceptance of funds by RFC while it had knowledge of Johnson's claims, was in "fraud" of its "rights." Johnson demands a constructive trust as its remedy.

In its brief Johnson asserts that the *fraud* was "constructive." Whether the fraud is called intentional or constructive the result is the same. The District Court could find absolutely nothing in the record raising an issue of fact concerning this charge.

A constructive trust is a remedy which is imposed when the constructive trustee has acquired property to which another party is entitled. The claimant must have an interest in the specific property, however, before the remedy can be invoked. Unlike a lien, a mere charge upon property, a constructive trust is predicated upon a beneficial interest in the property. It is imposed for a rightful owner, not a general creditor. The facts in this case do not permit of the findings necessary to support the remedy and no genuine issue of fact has been raised.

Johnson ignores the facts in asserting that RFC took property in which Johnson had an interest. The only property which RFC received was from the Tuolumne sinking fund, which had come from the trust fund, which had come from the earnings of the dredge. Johnson was never more than a general creditor in regard to any of those funds.

Johnson distorts the facts in claiming that RFC used the construction fund for other purposes than payment to Johnson and

then took the earnings of the dredge for itself. The true relationship between Johnson, Tuolumne and RFC can be ascertained from the agreements between the respective parties. Johnson's argumentative interpretation of the facts cannot change the legal import of the agreements. The earnings of the dredge were Tuolumne's property, but it had an obligation to transfer them to the trust fund and then the sinking fund. Johnson had no right, title or interest in the earnings of the dredge. Nothing in the agreement gave it any right to the earnings. If it gained such a right by some other means it should have made a showing to that effect in opposition to the motion for summary judgment. It could gain no such right from the mere fact of being a creditor. In the absence of such a showing the District Court was entitled to find the facts from the documents it had before it.

Johnson asserts there was a confidential relationship between it and the RFC. This assertion is so absurd that we take no more time to refute it. The assertion would be entitled to consideration only if Johnson had made some showing that it could raise a serious issue of actual fraud.

Johnson next suggests the notion that the RFC held the construction fund in trust, but the theory of the case relied on (*Whiting-Mead Co. v. West Coast, etc. supra*) does not apply to the facts of this case. The remedial device of a constructive trust of the construction fund could be used only against an unexpended balance. Tuolumne used the fund as working capital in the operation of its business, exhausting the only property upon which a constructive trust could be imposed, and there is nothing in which Johnson had any interest to impose a trust on now.

(a) A debtor may prefer one creditor over another.

Assuming that Johnson had the rights it claims, including a lien, there was no obligation on Tuolumne to pay creditor Johnson before creditor RFC. Tuolumne owed money to many people, but

was not insolvent or bankrupt. Therefore, it could pay its creditors in any order it chose. If any was dissatisfied, he had adequate remedies. Johnson could have used remedies such as receivership, attachment, injunction or, after it had a judgment, execution. If it had any rights against RFC, it could have brought an action in a timely manner. The mere fact that a debtor pays a junior encumbrancer, if that was the status of RFC, before it pays a senior lienholder, does not show fraud. More than the order of payment must be shown, yet nothing else is alleged by Johnson.

Under California statutes, particularly Civil Code Section 3432,* a debtor may prefer one creditor over another by conveyance of property, even if insolvency results and other creditors suffer. *U. S. v. Eleven Certain Parcels of Land*, 45 Fed. Supp. 289, 390. The fact that the preference hinders or delays other creditors in the collection of their claims does not render a preference void, nor does the fact that the preferred creditor had knowledge that such consequence would follow the preference. *U.S. Fid. & Guar. Co. v. Postel*, 64 C.A. 2d 567, 672, 149 P.2d 183; *Millard v. Epstein*, 58 C.A. 2d 612, 137 P.2d 717.

The charging allegations of the fourth counterclaim actually claim fraud only in relation to the payment received by RFC and applied on the debt secured by the *second* mortgage. It does not relate to payment applied to the first mortgage. The amount applied to the second was obviously not the entire amount of the proceeds of the operation of the dredge, being less than \$130,000, including both principal and interest; all of the remainder received by RFC was applied to the debt secured by the first mortgage and other expenses and advances and interest. Nineteen of the notes under the first mortgage were thus paid off. The limited

*"3432. *Payments in preference.* A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another."

charge of fraud then necessarily refers to the period between July, 1940, and September, 1942, when payments relating to the second indenture and chattel mortgage were made.

Johnson was simply a creditor whom Tuolumne opposed with claims at least as great. All the claims were the subject of a pending lawsuit when the second RFC mortgage was paid off. Johnson's lawsuit against Tuolumne was equated by that of Tuolumne against Johnson. The outcome of the litigation was not predictable and there was no reason for RFC not to accept payment while the funds were available.

The mere payment of a later creditor (the second loan) before payment to an earlier one (Johnson), in the absence of bankruptcy, is not fraudulent, yet that is the only act upon which Johnson relies to support this counterclaim.

If RFC were vulnerable to the Johnson claim that payments credited to the second indenture were fraudulent, RFC would still be entitled to the payments by simply crediting the amounts to payment of the earlier debt, secured by the first mortgage. The best Johnson could hope for would be the reduction of the earlier debt to approximately \$300,000 and the reestablishment of the debt under the second mortgage with its claim in between. It would not make the Johnson claim prior to the first RFC mortgage.

(b) Action on the fourth cause of counterclaim is barred.

The cases hold that discovery is not actual knowledge; discovery is sufficient notice or knowledge to put a prudent man upon inquiry which would have led to a knowledge of the facts. *Lee v. Hensley*, 103 C.A. 2d 697, 230 P.2d 159; *Hobart v. Hobart Estate Co.*, 26 C.2d 412, 436, 159 P.2d 958.

"Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such facts." Calif. Civil Code Sec. 19.

The facts are that Johnson knew that Tuolumne and RFC had executed the second indenture and chattel mortgage. It had legal notice of the fact by virtue of the recordation of the second indenture immediately after its execution. Actual knowledge of the fact in January, 1940, five months before the repayment began, is admitted.

Johnson also knew or should have known that Tuolumne was receiving the profits of its operations and was applying them to its debts to RFC, for Johnson had agreed to be bound by the system under which Tuolumne's income had to be placed in the trust fund set up primarily for repayment of RFC debts. When Johnson had the additional knowledge of the second loan and of the continued operations by Tuolumne and at the same time was party to two lawsuits against Tuolumne in which the very amounts now sought from RFC were attempted to be collected from Tuolumne, it had notice or information of circumstances which should have put it on inquiry. That inquiry, if followed, would have led to full knowledge of the fact that Tuolumne was repaying RFC the second loan. A prudent man would have been put upon inquiry under those circumstances and that was a sufficient notice to start the running of the statute of limitations against Johnson's fourth cause of counterclaim.

Johnson admits that it knew of payments by Tuolumne to RFC in 1940 or 1941. (See Johnson's answer to interrogatory No. 60, Tr. 111, 122.) Failure to begin an action against RFC for nine or ten years after such knowledge is an inexcusable delay.

Johnson asserts at page 64 of its brief that RFC did not "repudiate" its supposed constructive trust until after Johnson had acquired a judgment against Tuolumne in 1949. Certain statements in the affidavit of Mr. Johnson are relied on. However, Mr. Johnson's affidavit, like the Johnson brief, ignores the documentary evidence which has been admitted to be authentic. The correspondence attached to the Request for Admissions shows that it is not

true that Johnson was delayed by any representation by RFC. The exchange of letters between RFC and Johnson after every conference to which Mr. Johnson and the other affiants refer negatives in every instance any promise or representation to Johnson. In no letter written by the RFC is there the slightest intimation that it would pay Johnson anything or that RFC desired that Johnson delay in protecting any rights it may have had. The most that can be found is an occasional statement that RFC would not attempt to interfere if Tuolumne chose to pay Johnson. Inasmuch as Johnson has not attempted to make any showing that the letters do not mean what they say or that they can be explained away in any other way, they must be believed, and no question of fact concerning them has arisen. Therefore, there is no reason why the statute of limitations on this particular claim did not begin to run at the moment RFC received money from Tuolumne. That being the case, Johnson's action is now barred.

RFC WAS ENTITLED TO JUDGMENT ON JOHNSON'S FIFTH CAUSE OF COUNTERCLAIM

The fifth cause of counterclaim is either a common count for money or else an action for breach of contract. It is alleged that Johnson paid sales taxes on the dredge and that Tuolumne is obligated to reimburse it under the construction contract. That obligation is to be found in Article XIII of the Johnson-Tuolumne agreement wherein it is stated that any taxes required to be paid "* * * are to be paid by the first party (Tuolumne) and not be considered as a part of the maximum guaranty price heretofore set forth, but shall be put into said revolving fund in addition to the maximum guaranteed price * * *" (Tr. 204)

The obligation arose at the same time as other obligations under the contract, September 24, 1938, when the dredge was delivered.

Payment into the revolving fund referred to the revolving fund which existed during the period of construction of the dredge. It was furnished with funds from the construction fund, from which payments were made to Johnson prior to September 24, 1938. If that is not the due date of the sales tax, it was due at the time of denial by the State of California of Johnson's protest against the tax, which occurred at least as early as February, 1941. (See Exhibits, 6, 7, 8, 9 and 12 attached to Requests for Admissions.)

The last exhibit referred to is a copy of a letter from Johnson to Tuolumne in which one of many demands was made on Tuolumne for payment.* In exhibit 13 attached to the Request for Admissions, the letter dated January 13, 1943, Johnson again stated its expectation that Tuolumne would pay the sales tax. Some months prior to that letter Johnson filed suit against Tuolumne for the sales tax.

(a) The sales tax is no obligation of RFC.

The theory upon which Johnson counterclaims against RFC for the sales tax is mystifying. There is no allegation of a written or oral agreement to which RFC is a party, upon which it could be based. Rather, it is stated that plaintiff RFC "* * * admitted the amount of such tax as above alleged was due and payable to Johnson under the [construction] contract * * *" Then it is concluded that the sum is due from plaintiff to Johnson "for the reasons hereinbefore alleged," none of which reasons relates in any way to the alleged sales tax obligation.

The simple fact of the matter is that Johnson has failed to state a cause of action against RFC for the sales tax and by the admitted facts has demonstrated that it cannot. Even if it were true

*It is interesting to note that in this letter Johnson took the position that it built the dredge as an agent for Tuolumne. That is inconsistent with any of the legal theories of the counterclaim.

that RFC had admitted that the sum was due Johnson under the construction contract, RFC was not a party to that contract. The admission, whatever its terms, is a legal nullity. Contracts are not made by one party admitting that a third party owes some money. Furthermore, the construction fund was not intended to cover the sales tax except as that debt took its place among many others. It was due from Tuolumne to Johnson but was not a charge against the construction fund any more than any other debt of Tuolumne.

The actual relationship of the parties regarding the sales tax is quite clear from the correspondence attached to the Request for Admissions. On January 27, 1943, (Exhibit 14) RFC stated it would give consideration to any requisition or recommendation of *Tuolumne*. On June 30, 1944, (Exhibit 15) Johnson stated that at the time the construction contract was drawn it was not known whether or not sales tax would be paid by Tuolumne. That letter was replied to on July 29, 1944, (Exhibit 16) and liability was denied by RFC.

If a complaint wholly fails to state a claim for relief, an appellant is in no position to complain about a summary judgment.

The evidence before the Court, like the pleading itself, is barren of any promise of RFC, supported by consideration, to undertake as its own the sales tax obligations of Tuolumne. In a word, this cause of counterclaim is frivolous.

(b) The sales tax claim is barred.

We have shown that the sales tax obligation arose no later than nine years before the counterclaim was filed. It is barred on that account. The allegation that RFC admitted, within four years before filing the counterclaim, that the amount was due Johnson under the construction contract is not an admission of any liability of RFC and could not affect the running of the statute against any claims against RFC.

RFC IS NOT ESTOPPED TO RAISE DEFENSES OF STATUTE OF LIMITATIONS AND LACHES

The question of estoppel relates to several of Johnson's assertions. It has been reserved for discussion at this point to avoid repetition.

Johnson's claims rest, ultimately, on the theory that, considering everything from its own point of view, equity ought to save it from any loss and should compel the government and Tuolumne to bear all the losses of the unfortunate dredging venture. In order thus to shift all of the risk it is presupposed that the government was required to protect Johnson's interests in a paternal sort of way and that Johnson itself could imprudently rely on misconceptions gleaned from conversations with government employees, without investigation of the legal authority of such employees to make representations binding upon the government, and even though Johnson's misconceptions were uniformly contradicted by correspondence between Johnson and RFC shortly following all of the conversations.

The air of injured innocence assumed by Johnson does not faithfully illuminate the facts, but in any event there is no basis for legal liability, particularly against the government. Those who do business with the government must protect themselves by ascertaining, before relying on alleged representations of government employees, that the employees have authority to make them. The government is not to be made the prey of those having purported equitable claims, which are outwardly plausible but have no origin in any legally enforceable commitment by one authorized by law.

As stated by Justice Frankfurter in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 at p. 383:

"It is too late in the day to urge that the Government is just another private litigant for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition

with private ventures. Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it. The Government may carry on its operations through conventional executive agencies or through corporate forms especially created for defined ends. See *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 390. Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."

Attempts to pin liability on the government and to estop it from asserting rights and defenses have been the subject of other United States Supreme Court decisions which have consistently upheld the theory that the conduct or statements of employees do not estop the government. See, for example, *Utah Power & Light Co. v. United States*, 243 U.S. 389 at 408 and *Pine River Logging Co. v. United States*, 186 U.S. 279 at 291.

The government is generally in a favored position with respect to claims of waiver, estoppel, laches, statute of limitations and the like. Laches is not imputable to the United States when it has a direct pecuniary interest in the subject of litigation. *United States v. Summerlin*, 310 U.S. 414, (1946); 5 *Cyc. of Federal Procedure*, Sec. 1530. A limitation against the government must be strictly construed in favor of the government. *Dupont, etc. v. Davis*, 264 U.S. 456, 462 (1924); *McCarthy v. Comm'r. of Int. Rev.*, 80 F.2d 618 (C.A. 9, 1935). The government is generally not subject to the statute of limitations on a suit of debt. *United States v. Dobbins*, 139 F.2d 169, (C.A. 5, 1943). No prescriptive title to land can be gained against the government. *Niagara Falls Power Co. v. Federal Power Com.*, 137 F.2d 787, 791, (C.A. 2, 1943); *Pavell v. Berwick*, 48 F.S. 246 (D.C. La. 1943).

Similarly, as in the first cases cited in this section, it is held that those who assert an estoppel against the government must determine at their own risk whether or not the government employee upon whose representation they purport to rely has authority to bind the government. An estoppel against the government is not easily raised.

Cases cited by Johnson concerning estoppel are either irrelevant or distinguishable. In *RFC v. Menihan Corp.*, 312 U.S. 81, it was simply held that RFC could be held liable for costs under a rule which specifically allows costs. *Keifer & Keifer v. RFC*, 306 U.S. 381, holds that a subsidiary corporation of RFC could be sued because the statute creating RFC authorized suits against it. No question of estoppel was considered. In *RFC v. Childress*, 186 F.2d 698 (C.A. 8, 1950) it was held that RFC was bound by an act of an employee who was authorized to represent the government and act on its behalf. No question of estoppel was involved. *United States v. Shofner, etc.*, 71 F. Supp. 161 (D.C. Ore., 1947) merely holds that RFC must sue in its own name rather than in the name of the United States.

United States v. D. & R. G. W., 16 F.2d 374 (C.A. 8, 1926) holds that the United States may waive a claim to a forfeiture and thereafter be estopped from asserting it. The case is not concerned with the problem of the necessity for statutory authority where it is claimed that some individual employee performed an act or made a statement allegedly giving rise to an estoppel, which is the Johnson claim. In *Dayton Airplane Co. v. United States*, 21 F.2d 673 (C.A. 6, 1927) the court distinguished between (1) officers of the government who must find in a statute clear authority for every act and (2) actions of the government through officers who are not limited by any statute but have unlimited discretion. Rules of estoppel and fair dealing apply in the second situation, according to the court, but where contracts are made with officers of the first type (such as employees of RFC) a mem-

ber of the public is charged with knowledge that it is dealing with an agent of known limited power. When the agent acts beyond those powers the principles of estoppel have no application against the government. *Branch Banking & Trust Co. v. United States*, 98 F. Supp. 757 (Ct. Cl., 1951) is to the same effect.

In *The Falcon*, 19 F.2d 1009 (D.C. Mo., 1927) it was held that the immunity of the United States from a defense of laches or statute of limitations may be lost by it in a case where it is only a formal party and a remedy sought in its name is really for enforcement of a right for the benefit of a private party. Generally the immunity is not lost except by Act of Congress clearly manifesting such purpose.

Cases invoking estoppel or waiver by state or municipal officials stand on the law of the particular state and need not be discussed.

United States v. Capital Transit Co., 108 F. Supp. 348 (D.C. D.C., 1952) was an action by the government for a tort and the defendant counterclaimed under the Tort Claims Act. A motion to dismiss the counterclaim was denied, although an independent action would have been barred by the statute of limitations. The court admitted no authority in point could be found; it assumed that the entire matter should be fully litigated because both the claim and counterclaim arose from the same accident. The decision may have merit if limited to its own facts. It is clearly different from the present one. RFC brought suit here against Tuolumne on unpaid notes of Tuolumne and to foreclose on property of Tuolumne. Suit was not brought primarily against Johnson. Johnson was merely a formal party, required to be named because of its claims against Tuolumne.

Johnson also cites three cases (Opening Brief, p. 36) on a theory that RFC was a guarantor of some Tuolumne debt to Johnson. In each of the cases a premature suit was brought on an express written guarantee. There is nothing of that nature to be found in this case as there is no contractual relationship between RFC and Johnson.

The arguments on estoppel are also answered by two cases overlooked by Johnson. In *Farm Security Administration v. Herren*, 165 F.2d 554 (C.A. 8, 1948) it is pointed out (p. 564), with numerous authorities cited, that persons dealing with an agent of the United States are charged with notice of the limitations of his authority. And in *RFC v. Martin Dennis Co.*, 195 F.2d 698 (C.A. 3, 1952), the RFC is found to be entitled to the protection of these rules. The latter case involved reliance on representations of employees and it was held that an estoppel would not be effected.

Johnson made no attempt either by way of affidavit or by way of legal authority to show that anyone *authorized by law* made any representation upon which Johnson was entitled to and did rely and was thereby induced to allow the statute of limitations to run before filing an action.

It is not urged that there can never be an estoppel against the government, but the situations allowing it are very restricted, especially when the estoppel is predicated upon acts of government employees which are not shown to be within their powers. See *First National Bank v. United States*, 2 F. Supp. 107 (D.C. Mo., 1932); *Dayton Airplane Co. v. United States*, *supra*, and generally on the question, Annotation, 2 ALR 2d 338 to 344.

Finally, the circumstances alleged by Johnson in the affidavits on file fall far short of an estoppel. There is no clear acknowledgment of a debt owed by RFC to Johnson or promise that the statute of limitations would be waived. Johnson was well aware that there was strong opposition to payment to it by RFC and in the correspondence any commitment was repeatedly refused. Too little has been shown to bring into operation the doctrine of estoppel. See *Howard University v. Cassell*, 126 F.2d 6 (C.A. D.C., 1941), cert. den. 316 U.S. 675 and 711. If Johnson had more to substantiate its claims, it had a duty to make a showing to the District Court.

THE JUDGMENT GRANTED ON THE RFC COMPLAINT DISPOSES OF ALL ISSUES AND IS RES JUDICATA

As was pointed out at the beginning of this brief, Johnson has appealed only from the judgment rendered against it on its counterclaim and has not appealed from the judgment rendered in favor of RFC on the latter's complaint. The second judgment has become final. It disposed of all the issues in the case because Johnson's answer to the complaint incorporated each and all of the allegations of the counterclaim by reference. (Tr. 77)

The judgment on the complaint was granted and became final after the judgment from which this appeal has been taken. It is a fact occurring since the judgment on the counterclaim, but it must be considered. The Court should dispose of the case on the facts as they now appear. The Court cannot escape reality by deciding the case upon a statement of facts which has become fictitious. The judgment settling the rights of the parties, granted on the complaint, involved the same facts and issues involved in the counterclaim. It cannot be set aside and cannot be disregarded. The judgment is a fact which irrevocably changes the contest on this appeal before this Court. That fact alone requires affirmance of the judgment on the counterclaim and makes it impossible for Johnson to recover on the counterclaim, even if summary judgment had been improperly granted.

The United States Supreme Court has recognized that factual matters, just as changes in the law, must be considered during an appeal. An appellate court has power not only to correct error in a decree of a lower court *but to make such disposition of the case as justice may require at the time, and in determining this question the court must consider changes in fact and in law which have supervened since the entry of such decree.* *Watts, Watts & Co. v. Unione Asutriaca di Navigazione*, 248 U.S. 9.

On some occasions the Supreme Court has remanded cases to lower courts for consideration by such courts of changes in law

or fact which have occurred since the entry of judgment. See *Villa v. Van Schaick*, 299 U.S. 152; *Walling v. James V. Reuter Inc.* 321 U.S. 671; *Patterson v. Alabama*, 294 U.S. 600; *Busey v. District of Calif.*, 319 U.S. 579; and *Latimer v. Cranor*, 205 F.2d 568 (C.A. 9, 1953). However, remand for reconsideration by a lower court is unnecessary where the facts and the legal effect are plain and the appellate court may make such disposition of the case as justice may require at the time it has the case before it.

In the exercise of appellate jurisdiction there is room not only to correct error in a judgment under review but to make full disposition "and in determining what justice does require, the Court is *bound* to consider any change either in fact or in law, which has supervened since the judgment was entered." *Patterson v. Alabama*, *supra* (emphasis supplied).

The supervening fact in this case, of which the Court must take account, is the judgment entered on RFC's complaint. The controversy now before the Court has already been decided and, under the principles of *res judicata*, that decision is binding. The same issues cannot be tried again. It is a generally accepted precept "that a party who has had one fair and full opportunity to present a claim and has failed in that effort should not be permitted to go to trial on the merits of that claim a second time." *Bruszewski v. United States*, 181 F.2d 419 (C.A. 3, 1950) cert. den. 340 U.S. 865.

"* * * The general principle back of the rules of *res judicata* has received recent and clear statement by the Supreme Court. 'Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties.' * * * A litigant is to have his day in court, but only one day in court, against another." *Caterpillar Tractor Co. v. International Harvester Co.*, 120 F.2d 82, 84 (C.A. 3, 1941).

Johnson has had its opportunity to litigate all issues raised by its counterclaim at the hearing on the motion for summary judgment on the complaint. When the motion was granted and judgment was entered, Johnson could have appealed and obtained a review, the same review which it seeks only on the earlier judgment against it on the counterclaim. Inasmuch as one judgment on the issues has become final, opportunity cannot be given to re-litigate what has already been decided.

CONCLUSION

We have demonstrated that the judgment of the District Court must be sustained "on the merits" on each cause of counterclaim; that the judgment can also be sustained on the defenses of the statute of limitations and laches, if the latter be considered applicable; that the government is not estopped to assert such defenses; and, independently of the merits of any of the causes of counterclaim or the merits of the defenses referred to, that the judgment rendered in the District Court on the RFC's complaint finally and conclusively determines the rights of the parties. That judgment having become final this appeal is moot and the judgment of the District Court may be affirmed on that ground alone.

Respectfully submitted.

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No. 14,122

IN THE
United States
Court of Appeals

For the Ninth Circuit

WALTER W. JOHNSON COMPANY,

Appellant,

VS.

RECONSTRUCTION FINANCE CORPORATION,

Appellee.

Appellant's Closing Brief

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IN THE
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WALTER W. JOHNSON COMPANY,

Appellant.

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RECONSTRUCTION FINANCE CORPORATION,

Appellee.

Appellant's Closing Brief

There are a good many indications in appellee's brief that it agrees with our main contention that the present case is essentially a "fact case." and, therefore, should not have been disposed of by a summary judgment.

It is true that appellee's brief makes no such express confession; to the contrary its counsel stoutly and ably contend that Johnson should not be allowed to recover on any theory. But nevertheless, counsel find it necessary at almost every point in their brief to support their arguments by

alleged "facts." These "facts," it turns out, are merely counsel's version of a keenly contested factual situation on the material issues in the case.

Before turning to a discussion of counsel's arguments addressed to the main points of our opening brief, let us take up a few examples of their ultimate reliance on "facts" which are not admitted, but are disputed, and on which there should be a trial.

It seems to be counsel's main contention that the 1937 Indenture executed by Tuolumne to RFC is controlling; that since the provisions of that document contain no direct promise to pay Johnson for the dredge, Johnson has no rights thereunder; and that, in view of the parol evidence rule, Johnson could not introduce evidence to alter the terms of the written instrument (Br. p. 6). Admitting that the moneys provided by the RFC were sufficient to have paid Johnson, and admitting further that RFC permitted the loan funds to be applied to other uses, counsel claim "whether there was anything wrongful about it is a matter of legal argument, not a question of fact * * *" (Br. p. 5).

However, in our brief, page 44, we cited the so-called "lender-builder" cases wherein it was established that if it was the purpose and intent of the parties to a building loan to finance a particular construction, and the builder relied on the loan, giving up his mechanic's lien or similar first security in favor of the lender's first mortgage, then the lender is obligated in equity to devote the loan moneys to this intended purpose. This is true regardless of the fact that the loan documents are between the lender and the owner only, and the builder is not a party thereto.

Therefore, we contend that we are entitled to prove that it was the basic purpose and intent of all concerned in the present transaction that Johnson would be fully paid, up to

the agreed contract price of the dredge, from the RFC loan; that Johnson relied on this understanding, and would not have yielded title to the dredge to the RFC otherwise. This is a genuine issue as to a material and essential fact.

The parol evidence rule would not enter into the presentation of this evidence. By attempting to have this court hold that the 1937 Indenture is the sole and exclusive evidence of the obligations of the parties, counsel attempt to exclude the very facts which are the basis of the rule stated in the lender-builder cases. Obviously there is no basis for such exclusion.

Another example of counsel's attempt to have its version of the facts accepted as the only correct version, is found in its lengthy review of the correspondence (Br. pp. 9-12). This review proposes to establish that there is no dispute over the alleged "facts" that RFC did not promise to pay Johnson anything (Br. p. 9); and that Johnson was never led to neglect or forego any legal rights or remedies (Br. p. 12). It is claimed that because these letters are contrary to Mr. Johnson's affidavit and deposition, this court should hold the latter "unbelievable," and accept the writings as the whole truth of the matter.

No better example of the existence of a genuine issue as to a material fact could be presented than this. On the one hand, counsel offer the letters; on the other hand, we offer Mr. Johnson's testimony; the letters tend to prove that no promises to pay Johnson were made; Mr. Johnson's testimony directly states that promises were made. A trial on the merits cannot be avoided. It will develop the truth of the dispute. Each party will present its witnesses. All witnesses will be subject to cross examination. There is no better way to determine the true facts.

A summary judgment cannot be granted in this state of the facts. The situation is reminiscent of that in *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 88 L. Ed. 967 (1944), where, notwithstanding a strong preponderance of affidavits on the side of the party who moved for a summary judgment, the Supreme Court held that one affidavit alone to the contrary was sufficient to raise an issue of fact sufficient to entitle the resisting party to a trial on the merits.

Another instance of disputed facts concerns the negotiations between Johnson and RFC for a settlement. Counsel attack the affidavits of Johnson, Hise, Smith and Kelly on the ground that they "barely touch on the material issues and do not detract from the admittedly true facts which show that RFC is entitled to judgment as a matter of law." (Br. pp. 16, et seq.) There is no question, however, but that these affidavits show repeated efforts to settle; that RFC encouraged the negotiations until October, 1949, and thereafter in August 1951 encouraged a different mode of settlement (Tr. 224-6). Not once in these negotiations was there any suggestion that Johnson's claims were barred by limitations or laches. The evidence, therefore, tends to prove waiver of and estoppel to assert these defenses. In attempting to show that these affidavits failed to prove that RFC agreed to pay Johnson, counsel entirely overlooked the effective manner in which these affidavits show that RFC waived limitations and laches.

One last example of appellee's further unwitting adherence to our position that the facts are genuinely in dispute is found in its argument that Johnson failed to show that the representatives of RFC had power or authority to waive limitations or laches or to raise an estoppel against the RFC (Br. p. 61). The record, however, shows that the representatives in question were for the most part the very

same persons who wrote and signed the RFC correspondence on which counsel so vigorously rely elsewhere in their brief (Norton and McCartney). If those individuals had authority for the purposes claimed by counsel, it would be presumed that they had authority to bind RFC in other respects. Furthermore, any facts bearing upon the limited powers of the individuals in question were within the ability of RFC, rather than Johnson, to produce. If the lack of authority on the part of those individuals is seriously raised, we think that appellee cannot help agreeing with us that there is an issue of fact which could not be decided without a trial on the merits. In both the cases cited by counsel on this subject at the top of page 61 of their brief, there had been trials on the merits.

We confidently asserted in our opening brief that the instant case is essentially a "fact case," and we feel that the foregoing examples, wherein opposing counsel themselves have relied on disputed facts, confirm this position. Therefore, a summary judgment should not have been granted.

THE JUDGMENT OF FORECLOSURE WAS NOT RES JUDICATA AS TO JOHNSON'S COUNTERCLAIM

RFC raises the point for the first time that the judgment of foreclosure which RFC obtained after RFC obtained a summary judgment on Johnson's counterclaim is res judicata not only as to the foreclosure, but also as to the counterclaim.

This argument is not worthy of serious consideration. The fact is that RFC's complaint for foreclosure and Johnson's counterclaim for a money judgment against RFC were treated as separate and independent controversies in the lower court. This was recognized, so far as RFC is concerned, by its prosecution of the separate proceedings which

resulted in the summary judgment on counterclaim from which this appeal is taken. The motion for summary judgment (Tr. 173), the opinion of Judge Lemmon (Tr. 243-274) and the Final Judgment on Counterclaim (Tr. 275), all relate to, are directed toward, and deal exclusively with the Johnson counterclaim.

On the other hand, the judgment which RFC subsequently obtained related exclusively to the foreclosure on the dredge, and did not in any way directly or indirectly purport to deal with Johnson's claims for a money judgment against RFC. We could demonstrate this more clearly were the records in the foreclosure proceedings before this court, but, of course, they are not.

It is well settled that that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged (CCP Sec. 1911). It frequently happens that a court or litigants may treat rights, claims or demands separately and differently and withdraw them from the scope of a judgment. Where this occurs, the judgment is not *res judicata* as to matters not so passed upon (50 C.J.S. 104). Where the judgment specifically expresses the issues determined and on which the relief is granted, only the issues so specified will be *res judicata* (50 C.J.S. 130).

I.

The Court Below Failed to Observe the Limited Scope of a Motion for Summary Judgment

In our opening brief, we complained that Judge Lemmon's Memorandum Opinion reads as though this case were being decided as if a trial on the merits had occurred. We showed that in at least three places in the Opinion the court considered issues "on the merits"; on another occasion, the Opinion "weighed" an issue, and on a further occasion, it

criticized Johnson's failure to "establish" the truth of a fact. We showed moreover that the Opinion proceeded as if there were no issue at all on the crucial questions of intent and purpose of the parties in the 1937 transaction. It did not consider any questions of waiver and estoppel regarding limitations and laches; as to the "wrongfulness" of RFC's disbursements; nor did it consider the nature and extent of RFC's unjust enrichment in using and taking the proceeds of the machine which Johnson built but which RFC failed to pay for.

Appellee points out (Br. p. 15) that the "effect" of a summary judgment is "an adjudication," and argues from this that the court below had the right to decide "on the merits." This is but a quibble, since our criticism of the opinion had nothing to do with the effect of the adjudication, but was directed plainly and directly toward a decision purportedly based on all the merits, when the full facts were not before the court at all.

Counsel cite *Suckow Borax Mines Consol. v. Borax Consol.*, 185 F.2d 196 (C.A. 9, 1950). There plaintiff's attempt to escape summary judgment was based solely on one alleged issue of fact, namely, whether plaintiff "had no knowledge, intimation or cause to believe" that a conspiracy existed prior to 1944. However, the record showed conclusively that this allegation was incorrect and the issue was not treated as genuine. The basic rule as to summary judgments was clearly respected. There is nothing in the state of facts in the instant case which remotely suggests that Johnson's claims of fact are not genuine.

II.

Johnson's First Cause of Counterclaim

Appellee contends (a) there was no third-party contract, and (b) the claim was barred by limitations or laches. We shall discuss these points in the order stated.

Judge Lemmon assumed, without deciding, that Johnson's claim as the beneficiary of a third-party contract was valid, but that such claim was barred by limitations. Accordingly, our opening brief on the first cause of counterclaim was restricted to demonstrating the error in Judge Lemmon's holding as to limitations, and for that reason did not discuss the third-party beneficiary theory.

Upon the basis of extensive authorities, we believe that the question whether a party is a beneficiary of a contract depends largely upon the "intent" of the parties thereto, and particularly upon the intent of the promisee. In cases somewhat similar to ours, a supplier has thus been held to be the beneficiary of such a contract.

Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252, 178 N.E. 498 (1931);

Woodhead Lumber Co. v. E. G. Niemann Investments, Inc., 99 Cal. App. 456 (1929);

City of Richmond v. Goodloe, 308 Ky. 549, 215 S.W. 2d, 128 (1948);

Niemann v. Nadelman, 136 Misc. 386, 240 N.Y.S. 47 (1930).

See also

Corbin on Contracts, Vol. 4, Sec. 776.

Under the cases cited there would be a genuine issue of a material fact as to the intent of the parties to the 1937 transaction, to be determined by testimony of the parties

thereto and material surrounding circumstances. Since the facts were not presented, and since the court below did not and could not pass upon the merits in any event, it would serve no useful purpose to pursue this phase of the case further.

The holding that Johnson's claim was barred by limitations was shown to be clearly erroneous at pages 28-36 of our opening brief. There we show that the court ignored and disregarded all the evidence showing that RFC waived and was estopped to assert the statute of limitations. We cited a case which we believed directly in point, *Begnaud v. White*, 170 F.2d 323 (C.C.A. 6, 1948), and a California case quite similar on its facts, namely, *Adams v. California Mutual B. & L. Ass'n*, 18 C.2d 487 (1941).

Counsel do not discuss these important cases. We submit that the reasoning and conclusion of those cases should be adopted by this court.

Appellee's argument that the RFC is not estopped to raise defenses of limitations and laches is set forth at pages 57-61 of the brief. The argument begins by an unfair attempt to characterize Johnson's claim as a plea for governmental paternalism. Appellee cites *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947) which was decided by a five to four vote and has been universally criticized as a retrogressive decision. The case is clearly distinguishable from our case in that the authority of the FCIC agent was a matter of public record in the Federal Register. That is not true of RFC officials whose authority is no more a matter of public record than if they were employed by a private corporation. The decision deprived a farmer of the benefits of crop insurance he had supposedly obtained from a government agency. In a dissenting opinion, Justice Jackson said in part:

“I * * * would hold these agencies to the same fundamental principles of fair dealing that have been found essential in progressive states to prevent insurance from being an investment in disappointment” (p. 388).

We venture to suggest that a recent change in the membership of the Supreme Court might well make Justice Jackson's views the law of the land.

Appellee's argument that its own employees may not have had the power or authority to waive limitations or to estop the RFC merely presents a question of fact as has already been shown.

The ultimate issue as to estoppel to assert the statute of limitations is, as we have consistently contended, a “fact issue.” The affidavits, deposition and other material in the court below show without question that RFC in 1938 offered Johnson \$40,000 in payment of the balance he claimed (Tr. 412); that RFC failed to pay the full balance claimed by Johnson because of a dispute raised by Tuolumne as to the amount thereof (Tr. 214); that Tuolumne improperly obtained \$15,000 of the Construction Fund before this time, although there was still a balance of \$40,000 in the Fund which would be paid to Johnson as soon as it was proper to do so (Tr. 215). After Johnson obtained a judgment against Tuolumne, one of the legal representatives of RFC recommended that \$65,000 be paid to Johnson (Tr. 227-228). Further negotiations took place on the basis of a possible settlement of \$75,000 (Tr. 239). There is much additional evidence reviewed in our opening brief at pages 10-14 showing that both McCartney and Norton, who represented the RFC, promised that RFC would see that Johnson was paid when the litigation with Tuolumne was ended.

On the basis of the *Begnaud* and *Adams* cases, *supra*, it is absolutely clear that the above facts, if proved at trial to

be true, would constitute a waiver or estoppel so far as limitations is concerned. Therefore, we say that there is no escape from the conclusion that Judge Lemmon erred in disregarding this evidence when he held that Johnson's claims were barred by limitations.

What we have just said with respect to limitations applies with equal force to counsel's arguments concerning limitations on the remaining causes of action in Johnson's counterclaim. It will, therefore, be unnecessary to repeat this discussion as the subsequent causes of counterclaim are taken up.

III.

Johnson Had an Equitable Lien in the Unexpended Balance of the Construction Fund. When RFC Diverted the Fund, It Became Liable to Johnson

Johnson's claim for an equitable lien rests upon the basic theory applied in *Smith v. Anglo-Calif. Trust Co.*, 205 Cal. 496 (1928); *Pacific Ready-Cut Homes, Inc. v. Title I. & I. Co.*, 216 Cal. 447 (1932) and *Theatre Realty Co. v. Aronberg-Fred Co., Inc.*, 85 F.2d 383 (8th Cir. 1936). In its brief, appellee does not dispute this theory. In short, the theory is that when a lender agrees to loan money to an owner to finance construction of a building, taking a mortgage prior to mechanic's liens, then all the loan funds must be devoted to costs of construction. The builder has an equitable lien on any part of the loan fund not used for that purpose.

In this case RFC agreed to loan money to Tuolumne, through the Construction Fund, to finance construction of the dredge, taking in return a mortgage prior to any claim of Johnson, the builder. Johnson relied on the loan for payment. Then RFC, which had complete control over the use of these funds (Tr. 38-39), did not devote all the funds to this purpose. Thus Johnson had an equitable lien on the

unexpended funds, under the authority of the above cases. Then RFC diverted these funds to other uses (Tr. 412-13). By so doing, RFC became personally liable to Johnson under recognized principles such as the liability of a depositary who pays a deposit to a party not entitled thereto. Thus in the *Pacific Ready-Cut Homes* case, the lender paid the balance of the loan moneys to itself to apply on the loan, and there was, of course, no question but that this unauthorized payment subjected it to liability.

The same result is reached under the estoppel theory advanced in our opening brief (pp. 37-40).

Appellee asserts four arguments in reply. *First*, it is said that an equitable lien is a remedy only, predicated on a pre-existing right (Br. pp. 30-31, 38). We agree that such liens are equitable remedies. However, as the *Smith* and other cases make clear, there need be no recognized pre-existing legal right on the part of a builder against the lender. The very heart of the above cited decisions is that, because there was no recognized legal right, and since the builder was so clearly entitled to relief, the equitable lien was imposed as a suitable remedy. In view of these decisions, it cannot be doubted today that a builder does have at all times at least an equitable right against the lender to have the loan fund used strictly for its intended purposes.

Second, appellee relies on the rule that the lender need only advance all the money, and if he does so, his obligation is at an end, even if the builder is unpaid (Br. pp. 31-34, 38, 46-47). But that principle gives RFC no protection. RFC did not advance all the money; rather it diverted it to other uses (Tr. 397-8, 412-13). The words of the Court in the *Pacific Ready-Cut Homes* case are most in point:

“The defendant mortgage company, having received the benefit of plaintiff’s performance in the form of a

completed building and therefore a more valuable security for its note, is not justified in withholding *or appropriating to any other use* money originally intended to be used to pay for such performance and relied upon by plaintiff in rendering its performance." (Emphasis added) (P. 452).

RFC appropriated the money to another use—it thereby became liable to Johnson. In *Crescent Lumber Co. v. Borchers*, 59 C.A. 2d 318 (1943), the lender did not divert the funds, but used them all to pay the contractors. The Court held that the lender was not obligated to advance more than it had agreed to loan.

Third, RFC contends that the theory benefits only those who have filed mechanic's liens (Br. pp. 34, 37). By this contention, appellee ignores the fact that Johnson is subrogated to the mechanics' liens of the subcontractors (Tr. 216-217). But even more important, the California rule is that filing for a mechanic's lien *is not* a prerequisite of an equitable lien. *Whiting-Mead Co. v. West Coast B & M Co.*, 66 C.A. 2d 460 (1944); 18 So. Cal. L. Rev. 261 (1945); 16 So. Cal. L. Rev. 264 (1942). The one case appellee cites to the contrary, *City Lumber Co. v. Park*, 14 C.A. 2d 431 (1936) merely states that the equitable lien cases then decided imposed equitable liens "in favor of the holder of a mechanic's lien * * *"—a dictum of negligible bearing on appellee's contentions.

Fourth, appellee insists again and again that Johnson has no claim because he obtained no lien (Br. pp. 36-37, 47). That is the very argument the courts rejected in the *Smith* and other "builder" cases. The point of these cases is that the builder gives up his right to a lien in reliance on being paid from the loan funds. These cases hold that in such circumstances, the lender must use all the loan money for the purposes intended. RFC is liable as a result. It diverted the money to other uses.

RFC Was Unjustly Enriched at Johnson's Expense When It Took All the Earnings from the Dredge, Leaving Johnson Unpaid

The basis of Johnson's claim for unjust enrichment is set forth in its opening brief (pp. 47-49, 54-59). Appellee does not contend RFC was not enriched; it was enriched by receipt of the earnings, and even by receiving the dredge as security without paying for it in full. The issue is whether the enrichment was unjust, and that is a question of fact. There is a mass of evidence on this point, and the unjustness as well as the extent of the enrichment cannot be determined without passing on the evidence.

Johnson urges that the Construction Fund was to be used to pay for the dredge, and in reliance thereon, it took neither a lien nor retained title as was its usual practice. (Tr. 213). Tuolumne had no funds to pay for the dredge (Tr. 212-13) and could get funds only from the earnings. By the Indenture RFC had complete control of these earnings (Tr. 47-50, 193). Thus when RFC diverted the balance of the Construction Fund to other uses, in equity and justice it had to leave some earnings available to pay Johnson. Instead it took them all, leaving Tuolumne insolvent. RFC was thereby unjustly enriched.

Appellee makes four contentions on this point also. *First*, it is said that Johnson knew that the earnings were to go to RFC (Br. p. 42). But Johnson did not know or agree that RFC would divert the Construction Fund from its intended source of paying for the dredge in full. The injustice of the enrichment stems from the fact that RFC appropriated to itself *all* sources of funds, using them to pay its claims, even those junior to Johnson's. If RFC's contentions were sound, the principles established by the lender-builder cases would

be valueless. Such contentions would enable lenders to induce builders to yield the title and liens to the proposed construction in reliance upon the loan funds. Then, after construction was finished and the loans were well secured, the lenders could appropriate not only the unexpended balance of the loans for themselves, but could take the rents, issues and profits of the building or other construction also. It was to avoid such abhorrent results that the doctrine of the lender-builder cases was adopted.

Second, appellee says Johnson can have no lien on the fund because the fund is gone (Br. pp. 42, 44, 46, 48). This is but another way of stating RFC's second argument discussed in III above. But as we said there, it is indeed a naive idea that one who holds a fund subject to a lien can spend it without becoming liable to the lien claimant. Nor is it any answer to say that Johnson should have enjoined diversion of the fund (Br. p. 44). By not doing so, Johnson may have lost claims against bona fide purchasers, but not against the wrongdoing transferor.

Third, appellee asserts it received no property belonging to Johnson (Br. p. 45). Of course it is obvious that to recover, Johnson need not show it had legal title to the earnings. The question is whether, under all the facts, Johnson was entitled, in equity, to be paid from them. Clearly it begs the question to say he is not because they were not his property—that is the very question this Court must decide.

Fourth, the Construction Fund could be used for "working capital," appellee insists (Br. p. 47). But this argument ignores the fact that before Johnson entered the transaction, he was shown by RFC a list of the uses to which the fund was to be put (Tr. 398). This is a dispute of fact to be settled at trial. Also, it assumes that Johnson's rights against RFC are governed solely by RFC's contract with

Tuolumne. But that is not so, any more than the builders in the *Smith*, *Pacific Ready-Cut Homes*, and *Theatre Realty* cases were limited by the loan agreement with the owner. It is not enough to look at the four corners of the Indenture (Br. pp. 6, 22, 47), as these cases clearly establish. The representations and promises made, and inducements offered by RFC directly to Johnson, are basic. They are in dispute, and, a trial is necessary to resolve the dispute.

V.

RFC Is a Constructive Trustee for Johnson

The constructive trust is another remedy used by equity for the purpose of working out right and justice. *Pomeroy, Equity Jurisprudence*, Vol. 1, Sec. 155; Vol. 4, Sec. 1044 (5th Ed. 1941). We have seen that in this three-party deal, RFC assumed control of all of Tuolumne's assets and earnings. The arrangement provided a means to pay for the dredge, which RFC chose to disregard. Then RFC appropriated the earnings to itself, using them in part to pay off its second mortgage which was junior to Johnson's claim. By controlling all sources of funds for paying Johnson, RFC thereby assumed the duty to use the loan funds as it had originally promised to do, or at least to release to Tuolumne other funds for payment for the dredge.

To these principles, appellee attempts two answers, excluding the reiteration of points previously discussed. *First*, appellee claims that in a constructive trust, the claimant must have an interest in specific property (Br. p. 49) or a beneficial interest (Br. p. 48), and that Johnson had no right under the contract to either the dredge or its earnings (Br. p. 50).

Second, it is asserted that Johnson is but a general creditor of Tuolumne (Br. p. 52) and that a debtor may prefer

one creditor over another (Br. pp. 50, 51). These two contentions will be answered together. It is of course true that if Johnson had been fully paid, as was intended, out of the Construction Fund, it would have no right to payment from the earnings. But Johnson was not so paid, and it is submitted that, for the reasons already set forth, Johnson did obtain an equitable interest in the earnings of the dredge. Whether Johnson had such an interest in them is the question which must be decided. The decision on that point depends upon all the facts which are in issue in this case.

Johnson does not concede that this issue, or indeed any issue in this case, is to be decided by reference solely to the written documents, excluding the promises, representations of fact and conduct of RFC which are a part of the record. However, the Indenture alone makes it clear that RFC and Johnson were not intended to be creditors on an equal basis so that Tuolumne's alleged preference of one over the other was proper. This document clearly evidences an intent of all concerned that the dredge would be paid for in full; that it would then be put into operation, and after all costs of operation were paid, the net earnings would be used to pay off RFC's loan. The Construction Fund was the device set up to pay for the dredge, as we have already shown (Tr. 38-39). Any part of this Fund remaining after "completion of the construction work" was to be transferred to the Sinking Fund (Tr. 39), which was to be the source of funds for payment of interest and principal on RFC's loan (Tr. 49-50).

The proceeds from operation of the dredge were to go in their entirety into the Trust Fund (Tr. 47-48). This Trust Fund was to be used to pay costs of operation and expenses or obligations incurred in connection with the project (Tr. 48). Then, from time to time, funds were to be transferred

from the Trust Fund to the Sinking Fund, but if sufficient funds were not available to be transferred "they shall be so transferred as soon as available." (Tr. 48-49) From the Sinking Fund they would then go to RFC (Tr. 49-50).

The Indenture contemplated, therefore, that the dredge would be paid for first from the Construction Fund. Then general creditors of Tuolumne would come next, being paid from the Trust Fund. As a result of these facts, Tuolumne's general creditors had claims to the earnings from the dredge prior to those of RFC which had to rely on the Sinking Fund. Any surplus remaining in the Trust Fund would then be transferred to the Sinking Fund for repayment of the RFC loan. In effect, RFC, while a creditor as far as Tuolumne was concerned, was furnishing money in the nature of equity capital in its relation to Tuolumne's other creditors.

That this was the relationship envisaged by the parties is evidenced by their actions. Tuolumne put all its assets and earnings under RFC control. Johnson agreed to build the dredge and transfer title, free of liens, in reliance upon a Construction Fund which was completely under RFC control. And as a creditor of Tuolumne, Johnson had to look for payment to the Trust Fund (containing all the earnings) which was also under RFC control. Under the circumstances, it is incorrect to say that Tuolumne could prefer RFC if it wished, for in fact RFC made all the decisions and RFC chose to prefer itself in spite of the clear intent of the Indenture and surrounding circumstances to the contrary.

Referring again to the claim that there is no property upon which to impose a constructive trust, the provisions of the Indenture would seem to provide that either the Construction Fund, (Tr. 38-39) or the Trust Fund (Tr. 47-48)

or both, are such property. It is clear that a constructive trust can be imposed on a sum of money. *Church v. Bailey*, 90 C.A. 2d 201 (1949). In any case, the constructive trust doctrine is not as appellee would have the court believe.

It applies where one receives money to which he is not entitled. *Pomeroy, Equity Jurisprudence*, Vol. 1, Sec. 1047 (5th Ed. 1941). And where one is unjustly enriched at the expense of another, equity will impose a constructive trust. *Scott on Trusts*, Vol. 3, Sec. 461, 462.2 (1939). The facts of this case, as they will be brought out at trial, and even as they appear in the documents and limited facts of the record of this summary proceeding, demand that a constructive trust be imposed.

Appellee makes one final point: that Johnson should have attached or enjoined to protect itself (Br. p. 51). But Tuolumne had nothing which was free of RFC control, in the first place, and in any case, one who improperly transfers funds belonging to another cannot escape liability because the victim did not enjoin or otherwise prevent the wrongful transfer.

VI.

The Sales Tax Was a Cost of the Dredge for Which RFC Is Liable to Johnson in the Same Manner as It Is Liable for the Other Costs of the Dredge

Appellee appears to believe that Johnson bases its claim against RFC for the sales tax upon a bare admission by RFC that Johnson was entitled to reimbursement (Br. pp. 55-6). This, of course, is not true, as a careful reading of Johnson's opening brief will make clear (Br. pp. 65-7). Johnson's claim is that the sales tax was a cost of the dredge to the same extent as the other cost items that went into its construction. Johnson has shown that it is entitled to be

paid in full by RFC for these other costs. It should be paid for the sales tax by RFC for the same reasons.

When Johnson and Tuolumne executed the construction contract, they recognized that a sales tax might be imposed upon Johnson so they expressly provided that Johnson would be reimbursed if such an eventuality occurred (Tr. 199-203). RFC approved this arrangement. Thus all parties realized that a claim of Johnson for reimbursement might arise at once or long after the Construction Fund had been disbursed in which case Johnson would be forced to rely upon Tuolumne's earnings which were under RFC control. Johnson, therefore, was entitled to be repaid from the earnings of Tuolumne. Furthermore, Johnson was entitled to be repaid from the earnings of Tuolumne prior to any diversion of them to RFC. RFC had no direct claim upon the earnings. It had to rely upon the Sinking Fund which was replenished from the Trust Fund (earnings) but only if sufficient funds were available for the transfer (Tr. 48). By knowingly appropriating funds which were the only funds available to reimburse Johnson, and by appropriating them in the face of Johnson's valid claim to them which the terms of the Indenture gave priority over repayment of the RFC loan, RFC held those funds equitably for Johnson.

CONCLUSION

Although the facts and theories involved in the pending case are complicated, the issue on this appeal is a simple one.

We have demonstrated that genuine issues of fact existed and that Johnson was prevented from having a trial upon them. It follows that the summary judgment was erroneous and should be reversed. Appellee has made no real effort to deny the existence of a genuine issue of fact con-

cerning equitable estoppel to assert the statute of limitations. Appellee has made no attempt to answer the authorities which we cited on this point and which appear to be "on all fours" with this case.

But, in addition to the issue of equitable estoppel, we have shown that genuine issues exist as to the fundamental questions of the purpose and intent of the original financing, the wrongfulness of the disbursement of the RFC funds, and the nature and extent of the unjust enrichment which arose from RFC's control.

The simple analysis of this appeal is that RFC should have paid Johnson for the dredge, that he has never been paid, and that he is entitled to his day in court to prove that he is entitled to payment. There must be a trial "on the merits" in the interests of justice.

Respectfully submitted,

EDWIN SPRAGUE PILLSBURY,
JOSEPH R. CREIGHTON,
Attorneys for Appellant.



No. 14,122

In the

United States Court of Appeals

For the Ninth Circuit

WALTER W. JOHNSON COMPANY,

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION,

Appellee.

Petition for Rehearing on Behalf of Appellant

EDWIN S. PILLSBURY

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San Francisco 4, California

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FILED

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Appellee.

Petition for Rehearing on Behalf of Appellant

To the Honorable Clifton Mathews and Richard H. Chambers, Circuit Judges of the United States Court of Appeals for the Ninth Circuit, and William M. Byrne, District Judge (District of California):

This court has completely failed to consider the effect of *Federal Rule 56(c)* which raises the principal issue on this appeal: Does a genuine issue as to any material fact exist in this case?

Federal Rule 56(c) provides that a summary judgment shall only be granted on a showing that "no genuine issue as to any material fact" exists in the case. This court has affirmed the summary judgment rendered below without

once considering this issue. The District Court did not consider it. The court has ignored this issue despite the fact that we have demonstrated in approximately 90 pages of brief that there are numerous genuine issues as to material facts in this case. The heart of the District Court opinion is that the statute of limitations bars any recovery by appellant. This court completely ignores—as did the District Court—substantial evidence showing waiver of the statute of limitations by the Reconstruction Finance Corporation. In doing so, its holding is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *Begnaud v. White*, 170 F.(2d) 323 (1948) where that court reversed a summary judgment because an issue of fact relating to waiver of the statute of limitations was present.

This court has completely ignored substantial and genuine issues of fact relating to the basic liability of the appellee on the following grounds:

(a) Intention of the appellee and Tuolumne that appellant should be the beneficiary of a third party beneficiary contract;

(b) Appellant was entitled to an equitable lien upon the gold dredge senior to appellee's lien;

(c) Appellee had a duty to see that proceeds of the construction loan were utilized to pay appellant for its construction of the gold dredge;

(d) Appellee was unjustly enriched by appropriating the earnings of the dredge while appellant remained unpaid for constructing it;

(e) Appellee was liable for payment of sales taxes on the dredge which were paid by appellant.

This action of the court is all the more incomprehensible in view of its careful consideration of other provisions of

the Federal Rules of Civil Procedure applicable to this case. For example, this court dismissed our initial appeal because the original judgment of the District Court failed to comply with the requirements of *Rule 54(b)*; then, in its opinion rendered February 10, 1956, this court undertook to redesignate the pleadings to conform to *Rules 7* and *8*; furthermore, in the same opinion, this court literally applied the provisions of *Rule 36(a)* that failure to answer a request for admissions within the time specified constitutes admission of the matters involved therein, regardless of the fact that answers were subsequently filed *pursuant to stipulation expressly recognizing that the answers were a part of the record*. (Tr. 279) In view of these examples, it is difficult to explain how the court can justify ignoring the plain provisions of *Rule 56(c)* requiring the absence of any genuine issue as to a material fact before summary judgment will be granted.

It seems anomalous for this court to require a person appealing to it to prepare a Statement of Points on Which Appellant Intends to Reply when the court avoids discussing those points in its opinion. Also, we can discern little purpose in extensively briefing this case to point out the errors made by the District Court when this court completely ignores the matters set forth in our briefs.

Walter W. Johnson Company has earnestly sought satisfaction of its claims in the courts for nearly eighteen years. What it here seeks is the first fundamental principle of justice and due process—a trial on the merits. Instead of this, Johnson has been met by a judicial charge that it is seeking “alms.” Johnson has, in effect, received from the District Court and from this court a “trial by affidavits” which has overlooked its major contentions entirely. This court has rejected Johnson’s appeal by means of a brief

opinion dealing principally with procedural matters of minor importance, having by the court's own admission, no decisive bearing upon the merits of the appeal.

With regard to these procedural matters, the conclusion of the court that late answers to a request for admissions are ineffective *per se* and "*need not be considered*" (Op., footnote 8) is contrary to decisions of this and other courts. In *Bowers v. E. J. Rose Mfg. Co.*, 149 F.(2d) 612 (CCA 9, 1945), this court in an opinion by Chief Judge Denman held that it was an abuse of discretion for the trial court to strike late answers to a request for admissions and render a summary judgment upon inferences to be drawn from the failure to answer the request for admissions. In reversing the summary judgment, partially upon this ground, Chief Judge Denman said:

"* * * Though they sufficiently denied the requested admissions, they were ordered stricken from the files at the time the judgment was ordered. We think it was an abuse of the court's discretion so to strike the answers." (P. 615)

See also:

Countee v. United States, 112 F.(2d) 447 (CCA 7, 1940);

Hopsdal v. Loewenstein, 7 F.R.D. 263 (D.C. Ill., 1945);

Woods v. Stewart, 171 F.(2d) 544 (CA 5, 1948);

Jackson v. Kotzebue Oil Sales, 17 F.R.D. 204 (D.C. Alaska, 1955).

Much time, effort and money has been expended in prosecuting Johnson's claims. Win or lose, appellant is entitled to have its contentions considered and discussed in the court's written opinion, rather than to have them ignored.

Appellant respectfully suggests that a court may unwittingly fail to analyze and consider sufficiently the factors in a complicated case, where it decides the case without discussing the points raised by counsel, and, as here, merely states, in general terms, that it agrees with the court below. On the other hand, where the court delivers an opinion which deals squarely with the issues involved, it would seem more likely that the issues would have received more adequate consideration. In this connection, the following language by James A. McLaughlin of the Los Angeles Bar appearing in 9 California State Bar Journal, at page 246, is in point:

“Regardless of the superior qualities which a judge may possess, it is almost a mathematical certainty that he would not give the cases in which he wrote no opinion the same careful consideration which he gives to the cases where his opinion will be perpetually subject to the scrutiny of judges, professors, legal writers, and of the legal profession in general.”

Ten months elapsed between the oral argument on the first appeal and the court's opinion after the second appeal was perfected. No oral argument was had on the second appeal. It is possible that the court did not have the issues of the case as clearly in mind as it did ten months ago.

For the above reasons and because this case apparently represents a failure to observe the provisions of *Rule 56(c)*, the appellant respectfully prays that this court grant a rehearing before the full court in banc.

Dated: March 12, 1956.

Respectfully submitted,

EDWIN S. PILLSBURY

DAVID M. ATCHESON

Attorneys for the Appellant

Certificate of Counsel

The undersigned attorney for the appellant hereby certifies that in his judgment this petition for rehearing is well founded and that it is not interposed for delay.

Dated: March 12, 1956.

EDWIN S. PILLSBURY

DAVID M. ATCHESON

Attorneys for the Appellant

No. 14190

United States
Court of Appeals
for the Ninth Circuit

SUPERIOR SAND AND GRAVEL MINING CO., INC., a
Corporation,

Appellant,

vs.

TERRITORY OF ALASKA,

Appellee,

and

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLAR-
ENCE D. SMITH, JR., LILLIAN E. SMITH, EUGENE
E. SAXTON, DOROTHY M. SAXTON, ELLSWORTH
E. SAXTON and GRACE D. SAXTON, Co-Partners
Doing Business as the NORTHERN CONSTRUCTION
ASSOCIATION, and ELLSWORTH E. SAXTON, as
Agent for Said Association,

Appellants,

vs.

TERRITORY OF ALASKA,

Appellee.

Transcript of Record

Appeals from the District Court
for the District of Alaska,
Third Division

FILED

APR 12 1954

PAUL P. O'BRIEN
CLERK

No. 14190

United States
Court of Appeals
for the Ninth Circuit

SUPERIOR SAND AND GRAVEL MINING CO., INC., a
Corporation,

Appellant,

vs.

TERRITORY OF ALASKA,

Appellee,

and

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE D. SMITH, JR., LILLIAN E. SMITH, EUGENE E. SAXTON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON and GRACE D. SAXTON, Co-Partners Doing Business as the NORTHERN CONSTRUCTION ASSOCIATION, and ELLSWORTH E. SAXTON, as Agent for Said Association,

Appellants,

vs.

TERRITORY OF ALASKA,

Appellee.

Transcript of Record

Appeals from the District Court
for the District of Alaska,
Third Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Defendants.

In the District Court for the Territory
of Alaska, Third Division

No. A-8385

ANCHORAGE SAND AND GRAVEL COM-
PANY, INC., an Alaskan Corporation,

Plaintiff,

vs.

VERNON C. SCHUBERT, DOROTHY SCHU-
BERT, CLARENCE D. SMITH, JR.; LIL-
LIAN E. SMITH, EUGENE E. SAXTON,
DOROTHY M. SAXTON, ELLSWORTH E.
SAXTON, AND GRACE D. SAXTON, Co-
Partners Doing Business as NORTHERN CON-
STRUCTION ASSOCIATION; SUPERIOR
SAND AND GRAVEL MINING CO., INC.;
and the TERRITORY OF ALASKA,

Defendants.

COMPLAINT

Comes now the above-named plaintiff and for
cause of action against the defendants, alleges and
complains as follows:

I.

That the plaintiff is a Corporation duly organized
and existing under and by virtue of the laws of the
Territory of Alaska, having its principal place of
business at Anchorage, Alaska; that it has paid its
corporation tax last past due and has filed its an-

nual report for the last calendar year as required by the laws of the Territory of Alaska.

II.

That on the 10th day of April, 1950, the plaintiff entered into a written contract with the United States of America for the purchase of pit run gravel for a period of five years from the following described property:

The Southeast Quarter of the Northwest Quarter of the Southeast Quarter; the North Half of the Southwest Quarter of the Northwest Quarter of the Southeast Quarter; and the North Half of the South Half of the Southwest Quarter of the Northwest Quarter of the Southeast Quarter of Section Sixteen (16), Township Thirteen (13) North, Range Three (3) West, Seward Base Meridian, Territory of Alaska.

That immediately thereafter the plaintiff entered upon said property and ever since has been, and now is in the sole and exclusive possession of the same.

III.

That the plaintiff discovered sand and gravel upon the above-described property on March 2, 1950; that location notices were posted on November 27, 1950, and a Placer Location Certificate was filed in the office of the U. S. Commissioner and Ex Officio Recorder for the Anchorage Recording Precinct, Territory of Alaska, on November 30, 1950,

at 4:50 p.m., and recorded in Volume 53 at page 106 of Precinct records.

IV.

That the plaintiff on the 27th day of November, 1950, discovered sand and gravel upon the following described property, known as Claim No. 2:

The claim begins at a point 1320 feet west of the Corner Stake between Sections 16, 15, 21 and 22, Township 13 North, Range 3 West, Seward Base Meridian, and directly on said section line, designated by Corner Post No. 1; thence 1320 feet north to a stake marked No. 2, Discovery No. 2; thence 660 feet west to a stake marked No. 3, Discovery No. 2; thence south 660 feet to a stake marked No. 4, Discovery No. 2; thence 165.2 feet east, more or less, to a stake marked No. 5, Discovery No. 2; thence south 660 feet to East-West section line to a stake marked No. 6, Discovery No. 2; (this stake is offset thirty feet north of section line the same as Stake No. 1); thence east 494.8 feet, more or less, to point of beginning.

That location notices were posted on November 28, 1950, and a Placer Location Certificate was filed in the office of the U. S. Commissioner and Ex Officio Recorder for the Anchorage Recording Precinct, Territory of Alaska, on November 30, 1950, at 4:50 p.m., and recorded in Volume 53 at page 109 of Precinct records.

V.

That thereafter the defendants, Northern Con-

struction Association and Superior Sand and Gravel Mining Co., Inc., filed notices of location upon the entire Southeast Quarter of Section Sixteen (16), Township Thirteen (13) North, Range Three (3) West, Seward Base Meridian, as aforesaid, which embraced both claims of the plaintiff theretofore discovered by the plaintiff; that the discoveries of the plaintiff are prior to and paramount to any claims of said defendants.

VI.

That on the 21st day of August, 1952, the defendants known as the Northern Construction Association filed in the United States Land Office at Anchorage, Alaska, their application for a United States patent for said placer mining claim, and thereafter did publish in the Anchorage Daily Times, a daily newspaper published in Anchorage, Alaska, a notice of said application, the first insertion therein of said notice being in the issue of the 15th day of October, 1952.

VII.

That on the 9th day of December, 1952, plaintiff filed in the United States Land Office its adverse claim and protest against the allowance of a mineral entry on said application, and that said adverse claim and protest are now pending in the United States Land Office.

VIII.

That this action is brought in support of said adverse claim.

IX.

That the defendant, Territory of Alaska, has an interest in the above-described property for the reason that Section 16, described as aforesaid, has been set aside for the Territory of Alaska to use for school purposes.

Wherefore, plaintiff prays judgment against the defendants for the possession of said parcels of mining claims above described; for costs and disbursements in this action incurred; for a reasonable attorney's fee; and for such other and further relief as to the Court shall seem meet.

/s/ J. L. McCARREY, JR.,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed January 29, 1953.

In the District Court for the District of
Alaska, Third Division

No. A-8422

SUPERIOR SAND AND GRAVEL MINING CO.,
INC., a Corporation,

Plaintiff,

vs.

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE D. SMITH, JR.; LILLIAN E. SMITH, EUGENE E. SAXTON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON and GRACE D. SAXTON, Associated as the NORTHERN CONSTRUCTION ASSOCIATION, and ELLSWORTH E. SAXTON, as Agent for Said Association, ANCHORAGE SAND AND GRAVEL COMPANY, INC., a Corporation, and the TERRITORY OF ALASKA,

Defendants.

COMPLAINT TO DETERMINE ADVERSE PLACER MINING CLAIMS

Comes now the plaintiff in the above-entitled action and complains of the defendants, and for cause of action alleges:

I.

That plaintiff is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, having its principal place of business at

Anchorage, Third Judicial Division, Territory of Alaska, and that it has paid its annual corporation tax last due and has filed its financial statement and annual report last due with the Auditor of the Territory of Alaska and the Clerk of the District Court for the Third Judicial Division, Territory of Alaska, respectively, and, at all times herein mentioned was and now is a citizen of the United States of America and the Territory of Alaska.

II.

That Anchorage Sand and Gravel Company, Inc., is a corporation duly organized and existing as such under the laws of the Territory of Alaska.

III.

That defendant, Territory of Alaska, is an organized Territory of the United States of America.

IV.

That on and prior to the 27th day of November, 1950, the property hereinafter described and known as Section 16 in Township 13 N, Range 3 W, Seward Meridian, in the Anchorage Mining District, Third Judicial Division, Territory of Alaska, was part of the vacant and unappropriated public land of the United States, free and open to exploration and purchase by the citizens thereof, for the valuable mineral deposits therein contained.

V.

That on said date, to wit: on the 27th day of November, 1950, plaintiff's grantors, Helen U. Wil-

cox, Lucy Cuddy, Howard G. Wilcox, Betty Cuddy, Warren N. Cuddy and Daniel H. Cuddy, being citizens of the United States, entered upon said ground, hereinafter particularly described and known as the Superior Gravel Fraction Placer Mining Claim, Discovery Sand and Gravel Association Placer Mining Claim and Number 2 Sand and Gravel Association Placer Mining Claim and segregated the same from the public domain by posting a notice of location thereon and by distinctly marking the boundaries thereof upon the ground so that the same could be readily traced; and did, to wit: on or about the 27th of November, 1950, make a discovery of sand and gravel and other valuable minerals and valuable mineral deposits within the exterior boundaries on said Superior Gravel Fraction Placer Mining Claim, Discovery Sand and Gravel Association Placer Mining Claim, and Number 2 Sand and Gravel Association Placer Mining Claim, and did thereafter, to wit: on the 21st of February, 1951, cause to be recorded in the office of the Commissioner, Anchorage Recording Precinct, Third Judicial Division, Territory of Alaska, which was and is the Recording Precinct within which said placer mining claim was and is situate, true copies of said notices of location of said placer mining claims, giving the names of the said locators, said plaintiff's grantors as the locators thereof, the date of said location, the name of the claims and such a description of such placer mining claim hereinbefore referred to, and hereinafter particularly described, with reference to natural objects and permanent

monuments so that the same could be readily identified. Said property so located as aforesaid, being described as follows:

Superior Gravel Fraction Placer Mining Claim, more fully described as follows:

From a post situated at and identical with the North Quarter (N 1/4) Corner of Section 16, Township 13 North, Range 3 West, Seward Meridian, thence along an unimproved road approximately 1,320 feet (twenty chains) in an easterly direction along the North boundary of said Section 16 and Corner No. 2; thence in a southwesterly direction approximately 2,000 feet along the centerline of the Anchorage-Mountain View Road to the North-South Center Line of said Section 16 and Corner No. 3, which is monumented by Post No. 3, which is set approximately 66 feet (one chain) northerly approximately on the North-South center line of said Section 16, thence in a northerly direction along the North-South center line of Section 16, approximately 1485 feet (22.5 chains) to the place of beginning, and lies wholly within the Northeast one-quarter of said Section 16, containing 26 acres of land more or less.

Discovery Sand and Gravel Association Placer Mining Claim, more fully described as follows:

From a post situated at and identical with the Northwest corner of Section 16, Township 13 North, Range 3 West, Seward Meridian, thence along a brushed line in an Easterly direction

along the north line of said Section 16 approximately 2640 feet (40 chains) to the North one-quarter (N 1/4) Corner of said Section 16 to Post No. 2, thence following a brushed line in a southerly direction along the North-South center line of said Section 16 approximately 1485 feet (22.5 chains) to the center line of the Anchorage-Mountain View Road to Corner No. 3, which post is placed approximately 66 feet (1 chain) Northerly and approximately on the North-South center line of said Section 16 and is a witness corner, thence Westerly approximately 3000 feet along the center line of the Anchorage-Mountain View Road to the West side line of said Section 16 to Corner No. 4 which is monumented by a witness corner approximately 66 feet (1 chain) North of the true corner and Post No. 4, thence in a Northerly direction along the West side line of said Section 16 approximately 2072 feet (31.4 chains) to the place of beginning and is wholly within the Northwest one-quarter of Section 16, containing 135 acres of land more or less.

Number 2 Sand and Gravel Association Placer Mining Claim, more fully described as follows:

From a post which is situated at and identical to the Northeast corner of Section 16, Township 13 North, Range 3 West, Seward Meridian, thence approximately 2640 feet (40 chains) along a road in a Southerly direction along the

East side line of said Section 16 to the East one-quarter (E 1/4) corner and Corner No. 2, which is witnessed by a post set approximately 66 feet (1 chain) Westerly from said Corner No. 2; thence along a brushed line approximately 2640 feet (40 chains) in a Westerly direction along the East-West center line of said Section 16 to the center of said Section and Corner No. 3, thence approximately 1155 feet (17.5 chains) in a Northerly direction along the North-South center line of said Section 16 to the center line of the Anchorage-Mountain View Road and Corner No. 4, which is witnessed by Post No. 4 which is set approximately 66 feet (1 chain) Southerly of the true corner approximately on the North-South center line of said Section 16; thence in a Northeasterly direction approximately 2000 feet along the center line of said Anchorage-Mountain View Road to the point at which said road turns to follow the North side line of said Section 16 being Corner No. 5 which is witnessed by a post set approximately 66 feet (1 chain) southerly of corner No. 5; thence Easterly approximately 1320 feet along the center line of said Mountain View Road to the point of beginning, and lies wholly within the Northeast one-quarter of said Section 16, containing 134 acres of land more or less.

VI.

Plaintiff further alleges that said plaintiff and its said grantors ever since said date of the location of said placer mining claim have been and now are

the owners of said placer mining claims and locations, premises and property and the whole thereof, as to all persons, save and except the United States of America; are in possession and entitled to the possession of every part of the same. That said plaintiff and its grantors have complied with every rule, regulation and custom in force in said Anchorage Mining District, and with the provisions of the mining laws of the Territory of Alaska and the Acts of Congress in that behalf enacted; and the defendants herein have no right, title, or estate whatsoever in or to said placer mining claim or location, or in or to any part, portion or parcel thereof.

VII.

Plaintiff further alleges that defendants herein assert that they are and pretend to be the owners of all of said Section 16 in Township 13 North, Range 3 West, Seward Meridian, hereinbefore described, under and by virtue of placer mining locations pretendedly made by it or those under whom it claims, prior to the title of plaintiff, or its grantors, but which said pretended placer mining locations, and each thereof, so claimed by the defendants herein, or those under whom it claims were pretendedly made by defendants at the time when the said Section 16 and the whole thereof had passed into private ownership, and the same and no part thereof was vacant or unappropriated public land or free or open to exploration, or location, or purchase as part of the public domain, under the mining law of the United States, or otherwise.

VIII.

That the claims of the defendants herein are all, and each of them is, inferior and subordinate to the title of plaintiff and its said grantors, which title, last aforesaid, arises by virtue of the valid location so made by said plaintiff's grantors, as hereinbefore set forth, and defendants' claims and titles cast a cloud upon the possession and title of plaintiff and prevent it from enjoying fully and peaceably the fruits of its said ownership.

IX.

Plaintiff further alleges that the defendants herein, in pursuance of such conspiracy and to fully consummate the same, and wrongfully claiming to be the owner of said alleged and pretended placer mining claims, did heretofore, to wit: on or about the 24th day of September, 1952, file or cause to be filed in the United States Land Office at Anchorage, Alaska, in the Territory of Alaska, its application for a patent from the government of the United States of America, for said alleged and pretended Northern Construction Association Claim No. 3 and Northern Construction Association Claim No. 4, and for the whole thereof, and therein described as embracing all the North one-half of Section 16, in Township 13 North, Range 3 West, Seward Meridian, containing about 320 acres of land.

X.

That in and by said application for patent, defendants herein wrongfully, falsely and fraudulently

set up, alleged and claimed that they, said defendants, were and are the owners and in possession and entitled to the possession of the whole of the said alleged Northern Construction Association Claim No. 3 and Northern Construction Association Claim No. 4, embracing all of said North one-half of said Section 16, and the said placer mining claims and locations of plaintiff and its grantors.

XI.

That defendant, Territory of Alaska, claims an interest in the above-described property adverse to the claims of plaintiff.

XII.

That the said defendants have at all times since maintained and prosecuted and now do maintain and prosecute their said false, fraudulent and wrongful application for said patent, and thereby the title of the plaintiff in and to said placer mining claim and location hereinbefore mentioned, as duly located by plaintiff's grantors is impeached, clouded and encumbered, and the value of the estate and property of the plaintiff therein is greatly depreciated to the great and irreparable damage of the plaintiff.

XIII.

Plaintiff further alleges that heretofore, to wit: on the 12th day of December, 1952, and within the sixty-day period of newspaper publication of the said defendants' notice of application for patent, plaintiff filed its adverse claim against the issuance

of such patent to the said defendants for their said alleged and pretended Northern Construction Association Claim No. 3, and Northern Construction Association Claim No. 4, said adverse claim showing the nature, boundaries and extent of said adverse claim; and plaintiff brings this suit within sixty (60) days after the filing thereof, for the purpose of determining said adverse claim and the right of possession to the said placer mining claims so located as aforesaid by said plaintiff's grantors.

Wherefore, the plaintiff prays the judgment of this court that said defendants, Vernon C. Schubert, Dorothy Schubert, Clarence D. Smith, Jr.; Lillian E. Smith, Eugene E. Saxton, Dorothy M. Saxton, Ellsworth E. Saxton and Grace D. Saxton associated as the Northern Construction Association and Ellsworth E. Saxton as agent for said association, have no estate, interest, possession or right of possession in or to said alleged North one-half of said Section 16 in Township 13 North, Range 3 West, Seward Meridian, and the said placer mining claims and locations hereinbefore and in paragraph V hereof, particularly described as the property and estate of the plaintiff and the said mineral substances in said North one-half of said Section 16, contained, or either or any of them; and that the plaintiff be deemed to be the owner, and subject to the paramount title of the United States of America and lawfully in and entitled to the possession of the placer mining claims and locations in said Paragraph V particularly mentioned and described and of each and every the mineral deposits and mineral

substances therein contained and that the plaintiff's title thereto and to each and all thereof and to the possession thereof be quieted and confirmed as against said defendants and all persons claiming by through, or under it; and that said defendants have not and never have had any estate, possession, right of possession, title or interest whatsoever of, in or to said North one-half of said Section 16 in Township 13 North, Range 3 West, Seward Meridian, or any part or portion thereof, and that said defendants be forever barred from asserting or claiming any estate, right, interest, or right of possession therein, or to any part or parcel thereof, or to any mining claim or location therein; and that the plaintiff may have such other and further relief as the nature of its case may require and as shall seem meet.

/s/ JOHN E. MANDERS,
Attorney for Plaintiff.

[Endorsed]: Filed February 9, 1953.

[Title of District Court and Cause.]

No. A-8422

DISCLAIMER

Comes now one of the above-named defendants, Anchorage Sand and Gravel Company, Inc., and for itself only, answers the complaint on file herein as follows:

I.

The said defendant disclaims all right, title or interest of whatsoever character or extent, in or to any or all of the premises described in the plaintiff's complaint on file, embracing all of the North one-half of Section 16, Township 13 North, Range 3 West, Seward Meridian.

Wherefore, defendant, Anchorage Sand and Gravel Company, Inc., prays judgment against the plaintiff for its costs in this action.

/s/ J. L. McCARREY, JR.,

Attorney for Defendant, Anchorage Sand and Gravel Company, Inc.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed March 19, 1953.

In the District Court for the Territory
of Alaska, Third Division

No. A-8423

SUPERIOR SAND AND GRAVEL MINING
CO., INC., a Corporation,

Plaintiff,

vs.

VERNON C. SCHUBERT, et al.,

Defendants.

ANSWER AND CROSS-COMPLAINT

Comes now one of the above-named defendants, Anchorage Sand and Gravel Company, Inc., and for itself only, and not for its co-defendants, answers the complaint of the plaintiff on file herein as follows:

I.

Answering Paragraph I, defendant admits that plaintiff is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, but has neither information nor belief as to the remainder of said paragraph, and therefore neither admits nor denies the same.

II.

Defendant admits the allegations contained in paragraphs II, III and IV.

III.

Answering Paragraph V, defendant admits that notices of location were posted upon said ground and

that a copy of said notice was recorded in the office of the Commissioner, Anchorage Recording Precinct, Third Judicial Division, Territory of Alaska, and denies each and every other material allegation contained in said paragraph.

IV.

Answering Paragraph VI, defendant denies each and every allegation therein contained insofar as they pertain to the claims of the defendant as more fully set forth in Cause No. A-8385, Anchorage Sand and Gravel Company, Inc., an Alaskan corporation, vs. Vernon C. Schubert, et al.

V.

Answering Paragraph VII, defendant admits that it claims a portion of Section 16 in Township 13 North, Range 3 West, Seward Meridian, Territory of Alaska, and denies each and every other material allegation therein contained.

VI.

Answering Paragraph VIII, defendant denies each and every allegation therein contained, insofar as they pertain to the claims of the defendant.

VII.

Answering Paragraphs IX and X, defendant believes the allegations therein contained to be true as to all defendants save and except this defendant and the Territory of Alaska.

VIII.

Answering Paragraph XI, defendant believes the allegations therein contained to be true.

IX.

Answering Paragraph XII, defendant is informed and therefore believes that the defendants known as Northern Construction Association are maintaining and prosecuting their application for patent to said premises, but denies that said placer mining claim and location was duly located by plaintiff's grantors, or that plaintiff has any title to be impeached, clouded and encumbered so far as the claims of this defendant are concerned.

X.

Answering Paragraph XIII, defendant admits the allegations therein contained.

Cross-Complaint

Comes now one of the above-named defendants, Anchorage Sand and Gravel Company, Inc., and by way of Cross-Complaint against the plaintiff, alleges and complains as follows:

I.

Defendant does hereby adopt each and every allegation contained in its Complaint filed in Cause No. A-8385, In the District Court for the Territory of Alaska, Third Division, entitled "Anchorage Sand and Gravel Company, Inc., an Alaskan corporation, vs. Vernon C. Schubert, Dorothy Schu-

bert, Clarence D. Smith, Jr.; William E. Smith, Eugene E. Saxton, Dorothy M. Saxton, Ellsworth E. Saxton, and Grace D. Saxton, co-partners doing business as Northern Construction Association; Superior Sand and Gravel Mining Co., Inc., and the Territory of Alaska," and incorporates the same herein as though said Complaint were set forth in full.

Wherefore, defendant, Anchorage Sand and Gravel Company, Inc., prays that the plaintiff take nothing as against this defendant, and that the relief prayed in the Complaint in Cause No. A-8385 be granted.

/s/ J. L. McCARREY, JR.,

Attorney for Anchorage Sand
and Gravel Company, Inc.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed March 19, 1953.

In the District Court for the Territory
of Alaska, Third Division

No. A-8422

SUPERIOR SAND AND GRAVEL MINING
CO., INC., a Corporation,

Plaintiff,

vs.

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE D. SMITH, JR.; LILLIAN E. SMITH, EUGENE E. SAXTON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON AND GRACE D. SAXTON, Associated as the NORTHERN CONSTRUCTION ASSOCIATION, and ELLSWORTH E. SAXTON, as Agent for Said Association; ANCHORAGE SAND AND GRAVEL COMPANY, INC., a Corporation, and the TERRITORY OF ALASKA,

Defendants.

ANSWER

Come now the defendants, Vernon C. Schubert, Dorothy Schubert, Clarence D. Smith, Jr.; Lillian E. Smith, Eugene E. Saxton, Dorothy M. Saxton, Ellsworth E. Saxton and Grace D. Saxton, associated as the Northern Construction Association, and Ellsworth E. Saxton, as agent for said association, individually, and for answer to plaintiff's complaint, admit, deny and allege as follows:

I.

These defendants deny the allegations contained in paragraph I of plaintiff's complaint.

II.

These defendants admit the allegations of paragraph II of said complaint.

III.

These defendants admit the allegations contained in paragraph III of said complaint.

IV.

These defendants admit the allegations of paragraph IV of said complaint.

V.

These defendants deny each and all of the allegations contained in paragraph V of said complaint.

VI.

These defendants deny each and all of the allegations contained in paragraph VI of said complaint.

VII.

These defendants, for the reason that they have located and filed valid claims upon said lands, claim ownership of the lands embraced within the purported claims of the plaintiff, but deny each and all of the other allegations contained in paragraph VII of said complaint.

VIII.

These defendants deny all allegations contained in paragraph VIII of said complaint.

IX.

These defendants admit that they have filed in the Regional Office, Bureau of Land Management, Department of Interior at Anchorage, Alaska, an application for patent for the North One-Half (N 1½) of Section Sixteen (16), Township Thirteen (13) North, Range Three (3) West, Seward Meridian, but these defendants deny that said filing is either conspiratorial or wrongful, and allege that the claim of these defendants to said lands is valid and superior to the purported claim of the plaintiff.

X.

These defendants deny the allegations contained in paragraph X of said complaint.

XI.

These defendants deny the allegations of paragraph XI of plaintiff's complaint.

XII.

These defendants deny the allegations contained in paragraph XII of said complaint.

XIII.

These defendants admit that plaintiff filed an adverse claim, but deny that said adverse filing was either timely or valid.

Wherefore, having fully answered, these defendants and each of them pray that the complaint of the plaintiff be dismissed and that the plaintiff take nothing by reason thereof, and that these defend-

ants, and each of them, have and recover their costs and attorneys' fees herein incurred.

PLUMMER & ARNELL,

By /s/ E. L. ARNELL,
Attorneys for Northern Construction Association
and Ellsworth E. Saxton, Agent.

Service of copy acknowledged.

[Endorsed]: Filed April 13, 1953.

[Title of District Court and Cause.]

Nos. A-8385, A-8422 and A-8423

MOTION FOR CONSOLIDATION OF
ABOVE ACTIONS

Defendant Territory of Alaska moves the court, pursuant to Rule 42 (a) of the Federal Rules of Civil Procedure, for an order consolidating the above-entitled actions now pending in this court into one action, on the ground that they involve common questions of both law and facts and that consolidation will avoid unnecessary costs and delay. In support of this motion, defendant submits the affidavit of Thomas B. Stewart, attorney for the Territory of Alaska, attached hereto.

/s/ THOMAS B. STEWART,
Assistant Attorney General,
Territory of Alaska.

Dated April 28, 1953.

Thomas B. Stewart, being duly sworn, deposes and says:

1. He is one of the attorneys for the defendant, the Territory of Alaska, in each of the above-entitled causes.

2. These actions were brought respectively on the 29th day of January, 1953, the 9th day of February, 1953, and the 9th day of February, 1953, and each of these actions is now pending in this Court.

3. The issues in all of said actions arise out of conflicting claims to rights in the same real property, being Section 16 of T. 13 North, R. 3 West, of the Seward Meridian, and are based upon related facts. All of the actions involved common questions of law and facts.

4. Considerable time and expense will be saved by the consolidation of the three actions.

/s/ THOMAS B. STEWART,
Assistant Attorney General,
Territory of Alaska.

Subscribed and Sworn to before me this 28th day of April, 1953, at Anchorage, Alaska.

[Seal] ROSE WALSH,
U. S. Commissioner.

Service of copy acknowledged.

[Endorsed]: Filed April 28, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS UNDER
RULE 12 (b) (6) FRCP

The defendant, the Territory of Alaska, moves to dismiss the complaint filed by the plaintiff because it fails to state a claim upon which relief can be granted, and in support thereof assigns the following reasons:

1. The discovery of sand and gravel is not, and was not at the time of making the alleged mineral discoveries, a legal basis sufficient to support the location of mineral claims on the lands involved herein under the laws of the United States.

2. Ordinary sand and gravel are not “minerals” within the meaning of that term as used in the general mining laws of the United States.

3. The land embraced within the placer mining claims alleged in the complaint was not at the time of their location available to such location because of prior appropriation and use of the land by the United States of America and the Territory of Alaska for purposes of support of the common schools of Alaska and for other purposes.

4. Public lands of United States, reserved by Act of Congress from sale or settlement for the support of the common schools of Alaska, are not subject to placer mining locations for sand and gravel.

5. And for other reasons to be assigned at the hearing of this motion.

/s/ THOMAS B. STEWART,
Assistant Attorney General,
Territory of Alaska.

Service of copy acknowledged.

[Endorsed]: Filed April 28, 1953.

[Title of District Court and Cause.]

Nos. 8385, 8422, 8423

ORDER FOR CONSOLIDATION OF ACTIONS

The above-entitled actions came on for hearing on the motion of defendant, the Territory of Alaska, therein, supported by the affidavit of Thomas B. Stewart, attached thereto, and it appearing to the court that all of said actions involve common questions of law and fact, it is

Ordered, that the above-entitled actions be and they are hereby consolidated into one action in this court, and that the orders and proceedings heretofore had in said actions, respectively, are hereby made orders and proceedings in this action;

Ordered, the consolidated action shall proceed under the title of "Anchorage Sand and Gravel Company, Inc., an Alaskan Corporation, Plaintiff, vs. Vernon C. Schubert, Dorothy Schubert, Clarence D. Smith, Jr.; Lillian E. Smith, Eugene E. Saxton, Dorothy M. Saxton, Ellsworth E. Saxton,

and Grace D. Saxton, co-partners doing business as Northern Construction Association; Superior Sand and Gravel Mining Co., Inc., and the Territory of Alaska, Defendants; and Superior Sand and Gravel Mining Co., Inc., a corporation, Plaintiff, vs. Vernon C. Schubert, Dorothy Schubert, Clarence D. Smith, Jr.; Lillian E. Smith, Eugene E. Saxton, Dorothy M. Saxton, Ellsworth E. Saxton, and Grace D. Saxton, associated as the Northern Construction Association, and Ellsworth E. Saxton, as agent for said association, Anchorage Sand and Gravel Company, Inc., a corporation, and the Territory of Alaska, Defendants, No. 8385, Consolidated Action”;

And Ordered, that the clerk of this court be, and he is hereby directed and authorized to consolidate the files of said three actions above-entitled, under the file number of the action as herein ordered entitled.

This Order is made without prejudice to future motion by any of parties for separate trial of any of consolidated action.

Dated at Anchorage, Alaska, this 8th day of May, 1953.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed and entered May 8, 1953.

[Title of District Court and Cause.]

OPINION

Filed September 8, 1953

The foregoing actions were brought under the provisions of 30 U.S.C.A. 30, to determine the right of possession under the mining laws of the United States to a part of the public lands reserved to the Territory of Alaska for school purposes by the Act of March 4, 1915, 38 Stat. 1214, 48 U.S.C.A. 353. Since the consolidation of these actions, the defendant, Territory of Alaska, has moved to dismiss on the following grounds that:

(1) The discovery of sand and gravel is not, and was not at the time of making the alleged mineral discoveries, a legal basis sufficient to support the location of mineral claims on the lands involved herein under the laws of the United States.

(2) Ordinary sand and gravel are not "minerals" within the meaning of that term as used in the general mining laws of the United States.

(3) The land embraced within the placer mining claims alleged in the complaint was not at the time of their location available to such location because of prior appropriation and use of the land by the United States of America and the Territory of Alaska for purposes of support of the common schools of Alaska and for other purposes.

(4) Public lands of United States, reserved by Act of Congress from sale or settlement for the

support of the common schools of Alaska, are not subject to placer mining locations for sand and gravel.

The land involved is adjacent to the City of Anchorage and like that upon which the City is built, consists almost exclusively of gravel, which is valuable not only because of its proximity to the City but also because of construction activities.

To permit of the disposal of timber and the extraction of minerals from school lands under the mining and mineral leasing laws of the United States, the Act of March 7, 1939, 53 Stat. 1243 was passed. This legislation was implemented by Chapter 101 SLA 1933, Sections 47-2-78, et seq., ACLA 1949, empowering the Governor to lease these lands.

By October, 1950, the land here involved had been leased, and gravel was being removed from a portion of it, by the Anchorage Sand & Gravel Co., Inc., under a contract entered into with the Department of the Interior, pursuant to the authority conferred upon that Department by the Act of July 31, 1947, 61 Stat. 681, 43 U.S.C.A. 1185, 1187 commonly referred to as the "Materials Act." Manifestly, the removal of gravel would gut the land and render it worthless.

In November and December, 1950, the Anchorage Sand & Gravel Co., Inc., the Superior Sand & Gravel Mining Co., Inc., and the Northern Construction Association, parties to the actions now consolidated, also made locations of placer claims on the

[Title of District Court and Cause.]

OPINION

Filed September 8, 1953

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(2) Ordinary sand and gravel are not "minerals" within the meaning of that term as used in the general mining laws of the United States.

(3) The land embraced within the placer mining claims alleged in the complaint was not at the time of their location available to such location because of prior appropriation and use of the land by the United States of America and the Territory of Alaska for purposes of support of the common schools of Alaska and for other purposes.

(4) Public lands of United States, reserved by Act of Congress from sale or settlement for the

support of the common schools of Alaska, are not subject to placer mining locations for sand and gravel.

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In November and December, 1950, the Anchorage Sand & Gravel Co., Inc., the Superior Sand & Gravel Mining Co., Inc., and the Northern Construction Association, parties to the actions now consolidated, also made locations of placer claims on the

land under claims of discovery of sand and gravel. When the Northern Construction Association applied for a patent, the other claimants and the Territory of Alaska filed adverse proceedings in the land office and, in support thereof, the instant actions were instituted in this Court in which the Territory of Alaska was named as defendant.

Two questions are presented:

(1) Whether gravel is a "valuable mineral deposit" under the mining laws of the United States and, if so,

(2) Whether school lands in Alaska are open to location under the mining laws.

So far as the first question is concerned, the problem appears to be primarily one of ascertaining Congressional intent rather than of etymology. Section 22 of Title 30 U.S.C.A. provides that:

"Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

The state of the precedents is such that the ques-

tion may be regarded as an open one, to be resolved upon a consideration of factors bearing on intent in the light of history and such authorities as are available.

It is undisputed that the entire area involved, as well as contiguous areas, consists of sand and gravel possessing no particular property or characteristic which would enhance their value above that which is attributable to proximity of the land to Anchorage and the scene of construction activities.

Within a year after the enactment of the mining law of 1872, the view of the Land Department as to the meaning of the word "mineral" was set forth in a circular of instructions as follows: 1 Lindley on Mines, 163, 3rd ed.:

In the sense in which the term "mineral" was used by Congress, it seems difficult to find a definition that will embrace what mineralogists agree should be included. * * * From a careful examination of the matter, the conclusion I reach as to what constitutes a valuable mineral deposit is this: That whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantities and quality to render the land sought to be patented more valuable on this account than for the purpose of agriculture, should be treated by the office as coming within the purview of the Mining Act of May 10, 1872.

This view was followed in *Zimmerman vs. Brunson* (1910), 39 L.D. 310. A like conclusion was

reached in a well reasoned opinion in *United States vs. Aitken* (1913), 25 Phil. 7. However, *Loney vs. Scott* (1910), 112 Pac. 172, to the contrary, appears to extend the meaning of "mineral" to anything of value extracted from the land. Aside from the fact that this would seem to be a rather dubious test, it may perhaps be accounted for by the fact that that Court at page 175 mistook a statement of the theory of one of the parties in *Northern Pacific Ry. vs. Soderberg* at 188 U.S. 534, for the opinion of the Supreme Court. Perhaps influence by *Loney vs. Scott*, the Land Department in *Layman vs. Ellis* (1929) 52 L.D. 714, overruled the *Zimmerman* case and adhered to that decision in 54 L.D. 294 and *United States vs. Barngrover* (1942), 57 L.D. 533.

It is difficult for me to avoid the conclusion that in these cases undue weight was given to the value of gravel, as reported by the United States Geological Survey, and that the rule there enunciated may be attributed to a shift of emphasis from composition of the substance alleged to be mineral to value. I am inclined, therefore, to reject this criterion and to concur in the view that sand and gravel are not minerals, particularly where the location is made on land consisting almost exclusively of gravel, not only for the reasons stated by the authorities cited, but also because effect must be given to the implications of the word "discovery" in 30 U.S.C.A. 23 and the clause "and the lands in which they (mineral deposits) are found" in Section 22 of that title. Congress must have had in mind minerals which ex-

ist separately and differ from the surrounding matter in which they are found and from which they may be taken only by extraction and mining, *United States vs. Iron Silver Mining Co.*, 128 U.S. 673, 679; *Hendler v. Lehigh Valley R. Co.*, 209 Pa. 256, 58 Atl. 486, 487. Undoubtedly in requiring a discovery of mineral as a prerequisite to the appropriation of the land in which it is found, Congress intended to limit such appropriation and yet stimulate prospecting by rewarding the prospector who found a valuable mineral. In the traditional sense, it is difficult to conceive of a discovery not attendant with great hardship, effort and expense. 2 Lindley on Mines, Section 437, 3rd ed. To say that a discovery of gravel may be made in a large area of gravel open to view is to say that there can be a discovery of water in Cook Inlet or snow on Mt. McKinley. Such a perversion of the term would not only obliterate the safeguard referred to and result in the appropriation of large areas of the public domain to the detriment of the public, but it would also ignore the clause "and the lands in which they are found" in Section 23, of Title 30. It is inconceivable that this was within the contemplation of Congress. Further support for this view may be found in the fact that by the Act of July 31, 1947, 61 Stat. 681, 43 U.S.C.A. 1185, et seq., Congress authorized the disposition of sand, gravel, stone and clay from the public land. Since this act bears a close analogy to the mineral lands leasing act, it would appear to follow that sand and gravel, like the minerals specified in

the latter act, were not intended to be disposed of under the mining laws, Cf. Matter of Van Dolah A-26443, decided Oct. 14, 1952, by the Interior Department, Dunbar Lime Co. vs. Utah-Idaho Sugar Co., 17 Fed. (2) 351, 355-6, Holman vs. State, 41 L.D. 314.

The questions argued on behalf of Northern Construction Association and the Superior Sand and Gravel Mining Co., Inc., in opposition to the motion to dismiss, are either not presented by the record or are not involved and, hence, do not merit extended discussion.

I am of the opinion, therefore, that the motion should be granted.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed September 9, 1953.

In the District Court for the Territory of Alaska,
Third Division

No. A-8385 Consolidated Action
(Formerly A-8422 and A-8423)

ANCHORAGE SAND AND GRAVEL COM-
PANY, INC., an Alaskan Corporation,
Plaintiff,

vs.

VERNON C. SCHUBERT, DOROTHY SCHU-
BERT, CLARENCE D. SMITH, JR., LIL-
LIAN E. SMITH, EUGENE E. SAXTON,
DOROTHY M. SAXTON, ELLSWORTH E.
SAXTON and GRACE D. SAXTON, Co-Part-
ners Doing Business as NORTHERN CON-
STRUCTION ASSOCIATION, SUPERIOR
SAND AND GRAVEL MINING CO., INC.,
and the TERRITORY OF ALASKA,

Defendants,

and

SUPERIOR SAND AND GRAVEL MINING
CO., INC., a Corporation,

Plaintiff,

vs.

VERNON C. SCHUBERT, DOROTHY SCHU-
BERT, CLARENCE D. SMITH, JR., LIL-
LIAN E. SMITH, EUGENE E. SAXTON,
DOROTHY M. SAXTON, ELLSWORTH E.
SAXTON, and GRACE D. SAXTON, As-
sociated as the NORTHERN CONSTRUC-
TION ASSOCIATION, and ELLSWORTH E.

SAXTON, as Agent for Said Association;
ANCHORAGE SAND AND GRAVEL COM-
PANY, INC., a Corporation, and the TERRI-
TORY OF ALASKA,

Defendants.

ORDER

This cause came on to be heard on motion of the defendant, the Territory of Alaska, to dismiss the complaints in the above-entitled consolidated causes, on the ground the mining claims, which are the subject matter of the said causes, are null and void, and that therefore the said complaints fail to state a claim upon which relief can be granted, for the reasons set forth in an opinion of this Court filed herein on the 8th day of September, 1953, it is

Ordered, Adjudged, and Decreed, that the complaints herein be dismissed with prejudice.

Dated: September 15, 1953.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed and entered September 15, 1953.

[Title of District Court and Cause.]

Nos. 8385, 8422, 8423

NOTICE OF APPEAL

Notice is hereby given that Superior Sand and Gravel Mining Co., Inc., a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain order or judgment entered in the above-entitled cause by the above-entitled Court on the 15th day of September, 1953, in favor of defendant Territory of Alaska and against said plaintiff, wherein it was determined that the mining claims, the subject matter of said complaints, were null and void, that said complaints failed to state a claim on which relief could be granted for the reason set forth in an opinion of the Court filed in said action on the 8th day of September, 1953, and further ordering that the complaints of plaintiff be dismissed with prejudice, all as will more fully appear from said order or judgment.

Dated at Anchorage, Alaska, this 14th day of October, 1953.

/s/ JOHN E. MANDERS,
Attorney for Appellant, Superior Sand and Gravel
Mining Co., Inc., a Corporation.

[Endorsed]: Filed October 14, 1953.

[Title of District Court and Cause.]

Nos. A-8385, A-8422 and A-8423

STATEMENT OF POINTS ON APPEAL

Plaintiff-Appellant Superior Sand and Gravel Mining Co., Inc., herewith presents the points upon which it claims the Court erred:

1. In holding and deciding that the mining claims, which are the subject matter of said causes, are null and void.

2. In holding and deciding that sand and gravel are not minerals.

3. In holding and deciding that sand and gravel are not subject to location and disposition under the mining laws of the United States.

4. In holding and deciding that school lands for the support of the common schools of Alaska are not subject to placer mining locations for sand and gravel.

5. In allowing the motions of defendant Territory of Alaska, dismissing the Complaints in the above-entitled actions.

6. In dismissing the Complaints in the above-entitled actions.

7. In entering judgment that plaintiffs take nothing by their Complaints.

/s/ JOHN E. MANDERS,
Attorney for Plaintiff and Appellant, Superior
Sand and Gravel Mining Co., Inc., a Corpora-
tion.

[Endorsed]: Filed October 14, 1953.

[Title of District Court and Cause.]

Nos. A-8385, A-8422 and A-8423

COST BOND

Know All Men by These Presents: That we, Superior Sand and Gravel Mining Co., Inc., a corporation, as principal, and United States Fidelity & Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact surety business in the Territory of Alaska, as surety, are held and firmly bound unto Territory of Alaska, defendant in the above-entitled consolidated actions, in the penal sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said Territory of Alaska, said defendant, for which payment well and truly to be made, we bind ourselves, our successors or assigns, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of October, 1953.

The condition of the above obligation is such that whereas, the said Superior Sand and Gravel Mining Co., Inc., is about to take an appeal to the United States Court of Appeals for the Ninth Circuit to reverse a judgment of dismissal made, rendered and entered on the 15th day of September, 1953, by the District Court for the District of Alaska, Third Division, in the above-entitled consolidated actions.

Now, Therefore, the condition of the above obligation is such that if Superior Sand and Gravel Mining Co., Inc., shall prosecute its said appeal to effect and answer all costs which may be adjudged against it if it fails to make good its appeal, then this obligation shall be void; otherwise to remain in full force and effect.

SUPERIOR SAND AND
GRAVEL MINING CO., INC.,

By /s/ JOHN E. MANDERS,
Its Attorney,
Principal.

UNITED STATES FIDELITY
& GUARANTY COMPANY,

By /s/ GRACE M. McCONNELL,
Attorney-in-Fact,
Surety.

[Endorsed]: Filed October 14, 1953.

[Title of District Court and Cause.]

No. A-8385—Consolidated Action
(Formerly A-8422 and A-8423)

NOTICE OF APPEAL

Come now the defendants, Vernon C. Schubert, Dorothy Schubert, Clarence D. Smith, Jr.; Lillian E. Smith, Eugene E. Saxton, Dorothy M. Saxton, Ellsworth E. Saxton and Grace D. Saxton, co-part-

ners doing business as the Northern Construction Association, and Ellsworth E. Saxton, as agent for said Association, and give notice that they hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final order of dismissal entered in this action on the 15th day of September, 1953.

/s/ E. L. ARNELL,
Attorney for Northern Construction Association
and Ellsworth E. Saxton, Agent, Defendants-
Appellant.

Service of copy acknowledged.

[Endorsed]: Filed October 14, 1953.

[Title of District Court and Cause.]

Nos. A-8385, A-8422 and A-8423

COST BOND

Know All Men by These Presents: That we, Vernon C. Schubert, Dorothy Schubert, Clarence D. Smith, Jr.; Lillian E. Smith, Eugene E. Saxton, Dorothy M. Saxton, Ellsworth E. Saxton and Grace D. Saxton, associated as the Northern Construction Association, and Ellsworth E. Saxton, as agent for such association, as principals, and United States Fidelity & Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact surety business in the Territory of Alaska, as surety, are held and firmly

bound unto the Territory of Alaska, defendant in the above-entitled consolidated actions, in the penal sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said Territory of Alaska, said defendant, for which payment well and truly to be made, we bind ourselves, our successors or assigns, jointly and severally by these presents.

Sealed with our seals and dated this 31st day of October, 1953.

The condition of the above obligation is such that whereas, the said Northern Construction Association and Ellsworth E. Saxton, Agent, are about to take an appeal to the United States Court of Appeals for the Ninth Circuit to reverse a judgment of dismissal made, rendered and entered on the 15th day of September, 1953, by the District Court for the District of Alaska, Third Division, in the above-entitled consolidated actions.

Now, Therefore, the condition of the above obligation is such that if Northern Construction Association and Ellsworth E. Saxton, Agent, shall prosecute their said appeal to effect and answer all costs which may be adjudged against it if it fails to make good its appeal, then this obligation shall be void; otherwise to remain in full force and effect.

NORTHERN CONSTRUCTION
ASSOCIATION,

By /s/ ELLSWORTH E. SAXTON,
Agent,
Principal.

UNITED STATES FIDELITY
& GUARANTY COMPANY,

By /s/ GRACE M. McCONNELL,
Attorney-in-Fact,
Surety.

Affidavit of mailing attached.

[Endorsed]: Filed November 5, 1953.

[Title of District Court and Cause.]

Nos. A-8385, A-8422 and A-8423

STATEMENT OF POINTS ON APPEAL

Defendant-Appellant, Northern Construction Association, and defendant-appellant, Ellsworth E. Saxton, Agent, herewith present the points upon which they claim the Court erred:

1. In holding and deciding that the mining claims, which are the subject matter of said causes, are null and void.

2. In holding and deciding that sand and gravel are not minerals.

3. In holding and deciding that sand and gravel are not subject to location and disposition under the mining laws of the United States.

4. In holding and deciding that school lands for the support of the common schools of Alaska are not subject to placer mining locations for sand and gravel.

5. In allowing the motions of defendant, Territory of Alaska, dismissing the complaints in the above-entitled actions.

6. In dismissing the complaints in the above-entitled actions.

/s/ E. L. ARNELL,

Attorney for Defendant and Appellant, Northern Construction Association, and for Defendant and Appellant, Ellsworth E. Saxton, Agent.

Service of copy acknowledged.

[Endorsed]: Filed November 5, 1953.

[Title of District Court and Cause.]

Consolidated A-8385, A-8422 and A-8423

Before: The Honorable George W. Folta,
U. S. District Judge.

June 19, 1953—1:30 o'Clock P.M.

TRANSCRIPT OF RECORD ON APPEAL OF
EXCERPTS OF PROCEEDINGS ON MO-
TION TO DISMISS

Appearances:

J. L. McCARREY, JR.,

JULIANA D. WILSON,

Attorneys for Plaintiff, Anchorage Sand
and Gravel Company, Inc., an Alaskan
Corporation.

JOHN E. MANDERS,

For Plaintiff, Superior Sand and Gravel
Mining Co., Inc., a Corporation.

J. GERALD WILLIAMS,

THOMAS B. STEWART,

For the Territory of Alaska.

EDWARD L. ARNELL,

For Defendant, Northern Construction As-
sociation, and Defendant, Ellsworth E.
Saxton, Agent.

Mr. Stewart: If it please the Court, the second principal ground for dismissing the action in this case is, the Territory argues, that the land embraced within the placer mining claims alleged in the complaint was, at the time of the location, not available to such location because of prior use, and was for the use of the Territory of Alaska for the purposes of support of the common schools of Alaska and for other purposes.

* * *

Mr. Stewart: I have now stated the position of the Territory as to the law. In order to illustrate the uses being made to show that there were uses which would be inconsistent with the mining of gravel, it is necessary to make a statement as to which uses were being made. This is a matter which is outside the pleadings and it is a matter which might properly be alleged by affidavit. It would convert this portion of the motion, which we feel

should be distinguished from the prior portion which I argued, making this portion of the motion only into a motion for summary judgment, and I have to make a statement of facts in order to permit the Court to have it before it, if he cares to, as to what the uses were. I should like to make that statement a pure statement of the facts subject to objection by counsel for opposing sides to its being stated. You are familiar with the statement (speaking to counsel). The parties considered a stipulation on [3*] the matter, and I will state it, and I will illustrate it on the map, unless opposing counsel wishes at this time to object to it.

The Court: The objection would more properly be directed to the Court's consideration of it rather than your statement of it. I don't know what they could object unless you state it. There could be no harm to the parties in a mere statement of it. It is in the Court's considering it that might be prejudicial, as the objection will be directed to that——

Mr. Manders: That is the objection we have.

The Court (Continuing): Rather than your statement of it. Do you mean that——

Mr. Manders: I don't think it is material, your Honor.

The Court: But in order to have the record straight have to have the statement from him and make the objection.

Mr. Manders: That is true. We are dealing here with a motion to dismiss—not dealing with pleadings.

The Court: That alone wouldn't preclude the

Court's converting perhaps the motion into one for summary judgment, so long as it appeared that there was no issue of fact. Now I don't know. I've always required the party moving for the summary judgment to point out why there is no issue of fact, and if it became eliminated along the line, to point out the method by which it became eliminated.

Mr. Arnell: Upon the theory of the case Mr. Stewart presented there would be an issue of fact. Now he attempts to revert here to what I think are strictly equitable grounds [4] consistent with the opinion which Judge Dimond rendered sometime ago in another case. Now, in so doing I have no objection to his making a statement so long as it is understood that we have the right later to object and also make a similar statement or in the alternative produce evidence or file affidavits to controvert what Mr. Stewart says because when he makes a reference to use, of necessity somewhere along the line he is going to have to limit that statement to one that is very restricted, and likewise I would object upon the further ground that the actual lessees, the ones in possession, would be deprived, assuming that it is material, are the proper parties to raise the objection. My basis for that I will bring out in later argument on some other cases to the Court which show the nature of the Territory's interest in these lands that has been litigated in a number of jurisdictions.

Mr. Stewart: May it please the Court, I think that counsel has certainly a perfect right to object and to object to the position of the Territory before

the Court, but for the purpose of this argument only, that is whether or not there was a prior appropriation such as to prevent mineral entry, the statement need be merely of the facts of the use and limited to the specific area on the ground to which the use is being made. The Territory does not intend that the particular area is extended over the entire boundaries of the section, and I don't believe that the fact they are is open to very much question, and with leave of the Court, I [5] would proceed to state them on the basis the Court suggested. If they be objected to, if there is some controversy as to the truth of the facts stated, on the other hand if the opposing parties object to the statement of facts at this time, the Territory is quite willing to leave this portion of the argument at this time and have it considered at a later date with facts submitted on the basis of affidavit with an opportunity to the other parties to submit opposing affidavits if they think a controversial fact is alleged.

The Court: I don't see how I can pass on the situation as you described it because without making a statement to what you refer, then the objection would be one of mere procedure and not to the statement itself. It seems to me that you have to make a statement.

Mr. Stewart: In that case, your Honor, I will proceed with the statement, except for one other word about the meaning of the law at the time it stands.

* * *

Mr. Stewart: We proceed then to the statement of facts. I would like to make an illustration of it.

At the time of the staking of the claims in 1950 the entire tract was under lease from the Territory of Alaska to four parties. The portion of 80 acres to Mr. E. G. Bailey; (indicating) this portion outlined in green to A. T. Martin and the entire south half of the area to City of Anchorage and this little parcel to Pacific Airmotive and [6] in 1950 this lease was assigned to Reeve Airmotive. In addition, the Territory had granted a permit to the Alaska Road Commission to remove gravel from the section just shown there. The Bureau of Land Management under the Materials Act, April 10, 1950, permitted the Anchorage Sand and Gravel Company, one of the parties to this action, to purchase gravel from the area outlined here and it was also with the permission of the City, the lessee. In addition to those instruments illustrating the lease by the Territory and the disposition of the land by the Federal Government, uses of the land were being made and were restricted to these areas. Approximately 60 acres here was cleared for agricultural purposes and the soil turned and prepared for planting by the Martin Estate, Mr. Martin, who is since deceased, and approximately the area outlined there has been assigned by the Martin Estate to the military department of the Territory of Alaska and there had been erected on there at the time these locations were made a building, the warehouse building to house the materials and supplies of the National Guard. In this portion of the land Mr. E. G. Bailey had built a restaurant in that corner outlined by that green line there and in an area of ap-

proximately two and one-half acres on this side of the highway shown he had established a trailer park and residence and he had cleared another two and a half acres in this corner. In this area here the Martin Estate had leased the area outlined in blue to the City of Anchorage for the maintenance of facilities used [7] in connection with the operation of Merrill Field. The area had upon it buildings by way of hangars and places to store airplane parts and a parking area for airplanes. Approximately the area outlined here was used as the actual runway for Merrill Field. The rest of the field was lying in this direction, north and south here, and the City of Anchorage had used this small area outlined in red for a garbage dump and that was the extent of the actual uses being made of this land at the time these mineral claims were staked and the mineral claims themselves were made, as follows:

The Anchorage Sand and Gravel Company staked two claims of that description, one of the claims was the area which they had under lease from the Bureau of Land Management and the second claim was adjacent to it here. The Superior Sand and Gravel Mining Company did not itself stake claims. They are assignees of a group known as the Wilcox-Cuddy Group and they staked claims as illustrated. Five of the claims being alleged in their complaints—two of them and this one not being alleged—and the Northern Construction Associates staked four claims which are identical with the quarter sections of the entire section. That is the prestatement of

facts. If the opposing counsel desires to amend it or cite other portions of the statement I will be glad to offer the opportunity.

Now, it is the contention of the Territory that is the pattern of surface use which occurred there, that is the development [8] of this land for commercial purposes. The airport, the area for agricultural purposes on the Martin Estate, and the clearing of the lands and the use for trailer parking on the Bailey tract, illustrate the uses which would be inconsistent with the staking of the claims.

* * *

Mr. Stewart: That is correct. That is the position of the Territory and I believe that that concludes the argument of the Territory upon this motion.

The Court: Do counsel wish to begin their argument at this time or file briefs?

Mr. Arnell: If your Honor please, I don't like to start in and argue now with less than 30 minutes left. I don't like to impose on the Court and personnel. I would suggest if we be permitted the opportunity to a pretrial conference in chambers, we might possibly bring it to some conclusion and avoid the necessity of further argument or filing briefs. I personally would prefer to argue orally. Mr. Manders, I know will argue and we will both blow off the steam we have here in 30 minutes.

The Court: I think the case is the kind that should be briefed but referring to your suggestion for a pretrial conference what time would you suggest that that be held?

Mr. Arnell: Mr. Manders begs it not be held tomorrow, so perhaps some day early next week?

The Court: I don't believe the court's calendar next [9] week is such that would hardly permit it without holding a night session.

Mr. Stewart: Your Honor, the Territory objects to a pretrial conference. The issues are clearly drawn and are properly presented in open court upon the arguments upon the motion and I do not see the necessity of meeting in chambers to consider facts where there are no facts in issue.

Mr. Arnell: If your Honor please, Mr. Stewart has introduced a lot of facts in his statement here. I am only trying to dispose of this matter at the convenience of the court. I think it is not only the duty but a courtesy of Mr. Stewart to not stand here and say not do anything. I think it is up to all of us to cooperate on the matter and if we can avoid writing briefs on this maybe it would be burdensome to us. We have listened for two and a half hours to a resume of a lot of statutes and cases and to put in a brief would be on three cases and I don't think we should burden the court or ourselves if we can avoid it.

The Court: I don't think it is a case of discourtesy, I think it is a case of determining now whether there are any issues of fact because if there are no issues of fact, and that is the position of counsel for the Territory, then a pretrial conference would not only be superfluous but entirely futile.

Mr. Arnell: Well, I think, your Honor, that we could present our views as to what the law upon

these various phases are even though perhaps [10]
no——

The Court: Certainly that remains—I mean so far as a pretrial conference of course is concerned—with the issues of fact and if the only question before the Court is now whether you agree with counsel for the Territory that there is no issue of fact in which case then, the argument would be limited to the questions of law that are presented. If you disagree with counsel for the Territory that there are no issues of fact, you have to point out the issues of fact.

Mr. Arnell: As far as the statement of fact, as made by Mr. Stewart, your Honor, I pointed out before, that he leave you with his statement, not to the fact that is incumbent in this particular area, but to the nature and extent of the use.

The Court: I don't know that I follow you. You mean you do not dispute that use of the kind referred to by counsel for the Territory is being made of these sections but you disagree with him over the character of the use or the extent of the use?

Mr. Arnell: Both character and extent.

The Court: But both character and extent of use it seems to me would be material. The only thing is whether they are uses and whether they are uses regardless of their extent or character which are inconsistent with the location of the same ground as placer claims.

Mr. Arnell: The inconsistency is a matter of fact, your Honor, if we dispute it we have to establish facts which would show that there is no in-

consistency at this time under the law [11] as it existed at that time.

Mr. Stewart: Your Honor, is that not a matter of law—what we are arguing—as to whether or not it is inconsistent? It seems to me that Mr. Arnell is saying that to meet with him if it were a matter of fact. Isn't it a matter of law as to whether or not the use being made is inconsistent with the entry under the mining laws? It seems to me that that is the very issue at law which is clearly presented by these facts. Unless some dispute as to whether or not there was a use being made at that time then there is no issue of fact upon which to meet.

Mr. Arnell: Certainly an issue of fact, your Honor, upon the wording of the statute itself. Mr. Stewart read that particular portion of the section to your Honor and it says, "upon conditions providing for compensation to any Territorial lessee." I don't know any language that could be any plainer than that which would apparently permit the staking of these areas even though they were under lease, provided the lessee was compensated for any improvements. Now, there is no showing that any of the prime parties, in other words, Northern Association or Anchorage Sand and Gravel or Superior Sand and Gravel, have made any attempt to deprive the lessees of their surface rights. There is nothing so far as the court is concerned upon which the lessees at this time can claim compensation but if a lessee can claim compensation for his improvements that implies. I think beyond

all reasonable doubt, that this land could be open by right. [12]

The Court: That is a question of law and I say you are not foreclosed in arguing any legal question presented. That is not the question immediately before the court and the question that concerns me now and clearly presented is whether there is any issue of fact.

Mr. Arnell: I apparently have not made myself clear. Mr. Stewart illustrated to the court this 640 acres was encumbered by a number of leases. That is as far as we are willing to go as to the use made by the leases. Obviously the City of Anchorage uses in excess of 25 and 30 acres of its southwest corner.

Mr. Stewart: I alleged it.

Mr. Arnell: Mr. Bailey uses five acres of his 80. I don't know that the Road Commission is using anything. Anchorage Sand and Gravel is making use of some out there. Mr. Martin is using portions of the southwest corner.

Mr. Stewart: Those to me, too, your Honor, are the relevant facts and there seems to be no dispute about that. The court may wish to fix tomorrow or Monday to complete the arguments.

The Court: Of course, it is not a question of law as far as the inconsistent use is concerned until there is an agreement, until both sides have been heard on the question of inconsistency. In other words, if counsel here contends that his evidence would show that the uses made there are not inconsistent with the use of the land for mining, then

there is an issue of fact as to inconsistency. After the facts are before the court, even though [13] there may be a conflict in them, whether a conflict or a substantial agreement, then a question of law is presented but until it is, it is merely a question of law. Now on the statement of counsel, as I understand him he contends that he has evidence at his disposal that will show that the uses made by the lessees are not such as would be repugnant to mining. Am I correct in that?

Mr. Arnell: Well, your Honor, first of all I don't admit that we are concerned particularly with the uses. I think that is a condition that might arise subsequent to this proceeding. If under the law we would be entitled to establish or proceed to patent under these items then we would, if we ousted any of the lessees from their production of surface rights, have to compensate them for improvements, if they had any on any particular area.

The Court: I think you overlooked something and that is this: I am not attempting to dictate to you what position you should take in this case. If you contend that the inconsistent view is something that is immaterial, then you can waive it and you can make your argument on such as you see fit on the questions of law. If you want to waive some of it because you consider it immaterial, that is for you to decide.

Mr. Arnell: I realize that, your Honor. The only purpose I had in mind in making the suggestion was that perhaps in chambers we could state our position both as to the law and as to [14] the

precedent upon which we rely. Your Honor could then say upon this given set of facts I would apply this law, maybe we could get down to the point—maybe, I think, it is proper for the court to rule in a pretrial conference what law will apply to a given set of facts.

The Court: The application of the law is not the proper subject for a pretrial conference. I think if you take the position that there is nothing but the construction of the law in here that remains, that you should make an argument upon the law, unless of course you want to waive it.

Mr. Arnell: I don't want to waive it.

The Court: I think you will have to make an argument on the law because as I take it unless you want to put in evidence to rebut the evidence that is in the case by the statement of counsel for the Territory then there is nothing remaining but questions of law.

Mr. Arnell: Well, I reserved the right, your Honor, to file affidavits or make a statement when he first made the statement or offered the statement.

The Court: You do not have to reserve it. You still have that right, as I told you, if you want to controvert his statement as to the use made by the lessees why you certainly may have that opportunity.

Mr. Arnell: I do certainly, your Honor, so long as it has been raised as a matter of law, whether I agree with it or not is [15] immaterial.

The Court: If you consider it immaterial, as you indicated a moment ago, you don't have to.

Mr. Arnell: My hindsight might be better than my foresight, though.

Mr. Stewart: May it please the court, if counsel desires to file affidavits or otherwise object to this statement of the uses being made on behalf of the Territory, I should like to suggest that this portion of the argument, which has become a motion for summary judgment if this matter outside the pleadings is admitted, be postponed and be taken up at some different time, but that the argument on the initial portion of the dismissal be completed in the orderly process of the court tomorrow or Monday, whenever it may be, and that it be considered on its merits.

Mr. Manders: Question of mineral character of land?

Mr. Stewart: Yes.

The Court: It can't be Monday unless Mr. Moody is still sick and unable to go on with the trial of the Fowler case Monday and I have to wait until the case of Berg vs. City of Anchorage which I set for a definite time Tuesday. I understand the witnesses have been here three times now and that's the reason I made a definite setting to preclude any further inconvenience and expense so that if the case of Fowler goes on Monday, the rest of this argument will not be heard until Wednesday or Thursday of next week. [16]

Mr. Stewart: May it please the court, this argument was initially set down for the 28th of May and counsel for the Territory came here at that

time to argue it and I presume that counsel for all parties came to the court this afternoon prepared to argue. I don't wish to impose on counsel for opposing parties. I would like to make a suggestion subject to their willingness that it might be completed in the morning.

The Court: Tomorrow morning?

Mr. Stewart: Yes, sir.

Mr. Manders: Mr. Stewart, there was a very good reason why the matter was not heard on the 29th of May and then subsequent to that no judge was sitting in this court.

Mr. Stewart: I am not suggesting that it should have been heard in the meantime but I am saying it was called for that time.

The Court: What do the parties wish in that connection?

Mr. Manders: I will be very frank. I don't wish to be here tomorrow morning. I have been here all week.

Mr. Stewart: It is my understanding, your Honor, that the case now has a priority following some particular matter?

The Court: Following the case that is set for Tuesday. I don't recall the name—it has the word "airmotive" in it.

Deputy Clerk: Airport Machinery vs. Berg.

The Court: I set that at the specific request of the parties and the counsel so that the inconvenience and delay heretofore encountered in obtaining a trial date could be avoided, [17] and I feel I am bound by that commitment.

Mr. Stewart: One other question seems to me not quite clear—whether the balance of the argument which is to take place will be solely on the initial question which the Territory has raised or on the latter portion of it also.

Mr. Manders: What was that?

Mr. Stewart: Do you concede that the argument we will complete will be limited to the question whether sand and gravel is admitted under the mining laws, or whether it goes to the question of prior appropriation and use?

Mr. Manders: Mineral laws and whether it is open to location.

The Court: I think that it is not exactly correct to assume that it should be limited as you mentioned because once a motion to dismiss has been converted into a motion for a summary judgment for reception of evidence outside the motion, and that is the situation here, then the argument is on the motion for summary judgment. But it makes no difference because it would have to include an argument on all the questions that have been made under the motion to dismiss.

Mr. Stewart: Yes, your Honor, I realize that, but I am suggesting the possibility of considering the two points separately. I realize that the court would not want to try the matter piecemeal, but if the opposing parties desire to introduce some [18] evidence——

The Court: They better do it before the argument.

Mr. Stewart: That is all my question is, sir.

The Court: In other words, if the parties now wish to make a showing by affidavit in rebuttal of the statement that has been the subject of some comment here, that you do that before argument.

Mr. Manders: May I address the court? Do I understand Mr. Stewart correctly, that you are pressing the motion for summary judgment or pressing the motion for dismissal?

Mr. Stewart: May it please the court——

The Court: He is bound now by the conversion of the motion to dismiss into one for summary judgment. What is before the court is a motion for summary judgment.

Mr. Manders: This is the first opportunity we have had to say much in regard to this argument. You made mention, Mr. Stewart, that the Territory would be without the revenue, without money from those leases. What is the total revenue the Territory now gets from this land now under lease?

Mr. Stewart: May it please the court, it seems to me that is not a proper subject. I will be glad to confer with counsel in his office and tell him what the facts are.

The Court: If you know now you may state it.

Mr. Manders: Are they leased for rental?

Mr. Arnell: If your Honor please, as long as the leases are here in court and the point has been brought up and as long [19] as Mr. Stewart has raised the equitable questions involved here, I would like to at this time to request the court to require Mr. Stewart to produce the leases and I ask that they be filed as exhibits.

The Court: I think in a matter of this kind there should be a free interchange of information and I don't think there should be any objection to furnishing the figures in order to make the evidence bearing on the question of revenue complete.

Mr. Arnell: I didn't mean he didn't co-operate with me. He has shown me the leases. I think since it has been brought up it should be presented to the court for his ruling.

The Court: He could not have done it before until he discovered that there was no objection to his statement. Now, since there has been no objection to his statement, I think he would be perfectly willing to submit figures as to the revenue derived from these leases. Then it seems to me that the parties may file the affidavits, perhaps do it not later than before ten o'clock Monday morning, because if the Fowler case does not go on we should complete this.

Mr. Manders: You caught me in a corner. That is the one thing I did not want to do.

The Court: You did not want to work Saturday or Sunday?

Mr. Manders: No, I didn't. I have had no vacation of any kind. I can't take it.

The Court: What's the matter with co-counsel? Can't you [20] delegate the work to them?

Mr. Manders: I am perfectly willing that Mr. Arnell——

Mr. Stewart: Mr. Manders has been very considerate to the Territory. He extended time to the Territory twice in which to plead.

The Court: I'm selfish enough to speak for myself. I am leaving here. My last day is next Friday and too many things are converging on the court by reason of delays such as this and the usual condition that I have encountered in the past, even with Judge Dimond here, was that the last few days were bedlam, and I want to avoid a repetition of that. I don't want to prolong this.

Mr. Stewart: I don't want to prolong, but perhaps on the sole question of the facts as to the character of the use there, it would be more profitable, rather than to submit affidavits if we did have a conference with the court on that sole question, that is the facts as to the use, which are the only ones pertinent to this motion.

The Court: That is the only issue of fact that I can see, and it arises only because of counsel's statement that he wishes to dispute it, and, of course, that is a proper subject for a pretrial conference, but when we speak of pretrial conference the time has to be set for that.

Mr. Stewart: Your Honor, yes.

The Court: Well, we might fix that for—I set something for 9:30 Monday? [21]

Deputy Clerk: Yes, sir.

The Court: It would have to be by at least 9:00 o'clock.

Deputy Clerk: Default divorce at 9:30 maybe put it over.

The Court: And then counsel would have to bear

in mind that a pretrial conference would have to be concluded in half an hour.

Mr. Manders: Monday at 9:00 o'clock?

The Court: Yes.

Mr. Manders: Very well.

The Court: We'll resume this case on notice then after the pretrial conference. [22]

June 25, 1953

The Court: What is the status of this case now with reference to resuming argument?

Mr. Stewart: The Territory is ready to proceed, your Honor. I wonder about the absence of one of counsel for one of the parties.

The Court: As I recall, when we recessed this case several days ago counsel for some of the defendants were to determine whether they would controvert the statement you made orally. What is the situation of that now?

Mr. Stewart: Your Honor, that is correct and I believe that the only objection raised was by Mr. Arnell and that he was to have come early to add to the statement if he desired at this time. If you recall, your Honor, in the conference in chambers there was one question brought up concerning whether there was a discovery of any other matter which might be determinable as mineral, and I wish to bring to the Court's attention an item of which it can take judicial notice to show there was no such discovery, so I don't think there is room for controversy on that fact.

The Court: I didn't hear everything you said,

but how do you propose to show that to the Court?

Mr. Stewart: By calling the Court's attention to a matter of judicial record, that is, the mineral claims on file in the Commissioner's office, which would show that only sand and gravel [25] were discovered and not some other valuable mineral as appears in the complaint of Superior Sand and Gravel Mining Company.

The Court: Well, is there any further evidence to be presented by way of affidavits then, or orally?

Mr. Arnell: I understood, your Honor, the other day that I would have the right to make an oral statement with respect to the statement of fact that Mr. Stewart made during the first day of argument in that, he left the inference, your Honor, that there was complete use of this land.

The Court: Before we go into that I just want to inquire of what counsel think about the answer of Mr. Manders? Whom does he represent?

Mr. Arnell: He represents Superior Sand and Gravel, which is the plaintiff in two of these cases. Your Honor, this is a peculiar case for the reason that it is an adverse proceeding. The Saxtons of the Northern Construction Association are legal defendants here and naturally they would like to see the motion of the Territory, upon one or two grounds, sustained because then it would mean that the adverse proceeding was lost and that the matter would revert back to the Land Office. However, on the grounds that are alleged here, you might have to decide for a plaintiff opposing the motion of the Territory.

Mr. Stewart: Your Honor, if I may interpose. Mr. Manders has said, and I think he was correct on this, that he wanted to submit this matter on briefs and perhaps it would be all right to [26] proceed with the argument, and then let the entire matter be further considered on briefs.

The Court: Well, what isn't clear to me is—now it is true that the matter may be submitted on briefs, but how is Mr. Manders going to reply to oral arguments here? Am I to understand that what is presented here this morning is something that he wouldn't be interested in or because of the interest of the several defendants?

Mr. Stewart: No, your Honor, I think he should be represented here.

The Court: Well, it seems to me if it is going to be that way your arguments ought to be summarized in written memoranda and filed later and copies served on him and he may have an opportunity to read them.

Mr. Arnell: I have no objection.

The Court: Well, I think that it will have to be done that way or continue the hearing itself. If there is no objection then it will be understood that the substance of the argument to be made here orally will be embodied in written memoranda and copies served on Mr. Manders so he may be afforded an opportunity to reply. Now, do you wish to present any evidence?

Mr. Arnell: I do, your Honor.

The Court: Well, perhaps that should be done first before your argument.

Thereupon, [27]

ELLSWORTH E. SAXTON

called as a witness on behalf of the Defendants, Northern Construction Association, first being duly sworn, testified as follows:

Direct Examination

By Mr. Arnell:

Q. Mr. Saxton, you are being asked to testify strictly for the purpose of informing the Court as to the nature and extent of the uses that were made by the various lessees in the year 1950 on the land embraced within Section 16, which is commonly termed "school lands." Would you state your full name? A. Ellsworth E. Saxton.

Q. Are you one of the defendants in this adverse proceeding? A. I am.

Q. Where do you live, Mr. Saxton?

A. 1398 Birchwood Street, Airport Heights.

Q. And how long have you lived in that vicinity?

A. Since 1946.

Q. Are you thoroughly familiar with the area known as Section 16? A. Yes, sir.

Q. School section? A. Yes, sir.

Q. Were you familiar with the uses that were made of that land in the year 1950?

A. Very familiar.

Q. At the time you staked the section, did you have knowledge [28] of the existence of any leases?

A. Yes, sir, I did.

(Testimony of Ellsworth E. Saxton.)

Q. Would you state which leases you had knowledge of?

A. I had knowledge of the City lease. I had knowledge of the Asa Martin lease, but I did not know of the Bailey lease at that time.

Q. Can you state briefly how much of the area that was leased to Mr. Martin was actually placed in use by him?

A. I believe there previously had been placed in use some 16 acres, but at that time none of it was in use.

Q. Do you know the approximate date——

The Court: Well, it isn't clear as to what time Martin leased it. You say "at that time none of it was used," well, that doesn't furnish the time you are referring to.

A. 1950.

Q. Approximately how many acres were embraced in the Martin lease?

A. I believe there were 240 acres.

Q. Are you familiar with the lease which was given to Mr. Bailey?

A. I have since become familiar with it.

Q. Are you familiar with the area—the land that is embraced in that lease? A. I am.

Q. Approximately how much of his 80 acres was placed in use now? A. Now or——

The Court: How much of his 80 acres—whose 80 acres? [29]

Mr. Arnell: Mr. Bailey's.

(Testimony of Ellsworth E. Saxton.)

The Court: There isn't anything in the evidence now.

Mr. Stewart: I think in my statement of fact I cited there was a lease to Mr. Bailey in October, 1950, and that it contained approximately 80 acres.

The Court: Well, that is the consequence of trying a case piecemeal. You can't remember everything that was testified to several days ago. You may proceed.

Q. (By Mr. Arnell): Do you know, Mr. Saxton, how much of that particular leasehold was in use by the lessee in 1950?

A. In 1950 he had two small—Mr. Bailey had two small areas under use. It consisted of a restaurant-dining car near Lang's Store in Mt. View and across the highway to the south he had a few trailers, or had established a place for trailers.

Q. Now, at the present time, Mr. Saxton, is he using any of the leased area south of there?

A. He is——

Mr. Stewart: I object to that on the ground that it is irrelevant to the issues at the time staking took place.

The Court: Well, his question didn't fix any time. It fixed the location. I am unable to recognize his statement—one as to place and yours as to time.

Mr. Stewart: Your Honor, the issue before the court is whether at the time the claims were staked there was a prior [30] appropriation of this ground so that the only relevancy as to uses is as to the use at the time claims were staked, which is Octo-

(Testimony of Ellsworth E. Saxton.)

ber, 1950; it would be immaterial as to what use is being made of it now.

Mr. Arnell: Your Honor, please, Mr. Stewart, has spent a great deal of time arguing inconsistencies of the uses that would exist. Assuming that one of the other of these people, or appropriators, would start to use the property for mining purposes which is in existence I think under the statute that is strictly permissible that comes under inconsistencies of the use. My question was directed to the extent of use and would show that Mr. Stewart's argument as to inconsistencies of the use would not stand up, particularly in light of the provision of the 1939 law that permitted the appropriation for supposed mining purposes under the mining laws of the United States.

The Court: I don't think he objects to your showing the uses or the extent of the uses, but he objects to showing the uses made and existing on the location of these claims, isn't that right?

Mr. Stewart: I withdraw the objection. I don't think the result is of any substantial value to result in legal argument.

The Court: But your question sounded as though it was directed to some area outside of this section.

Mr. Arnell: No; it is all within this section, your Honor.

The Court: Well, you mentioned to the south or outside. [31]

Mr. Arnell: Well, that is true. I mean, south of

(Testimony of Ellsworth E. Saxton.)

the area actually being used in 1950 which still was in the area leased by that particular lessee.

The Court: Very well.

Q. (By Mr. Arnell): Mr. Saxton, if you know, will you state whether or not Mr. Bailey, a lessee from the Territory, is making any greater use now of the area embraced within the lease than he did in 1950 at the time these claims were staked?

A. I am not sure I understand.

Q. Well, is he using any more land now than in 1950?

A. Oh, yes.

Q. If so, how much?

A. I'd say perhaps two and a half acres.

Q. Now, as a total, what would he be using now of the 80 acres?

A. Probably three acres.

Q. Is the rest of that particular lease vacant and unoccupied and unused?

A. Yes, sir, it is. It is brush.

Q. Do you know, Mr. Saxton, what area the City had under lease in 1950?

A. Yes. I do. The south one-half, I believe, is the way the lease read, although I never read it—they told me.

Q. Now, whose lease is this?

A. City of Anchorage. [32]

Q. Were there any operations being conducted on the south half at that time also?

A. Aside from the City, none.

Q. Was Anchorage Sand and Gravel conducting any mining operations, excavation operations there?

A. Yes, they were.

(Testimony of Ellsworth E. Saxton.)

Q. Approximately—the year 1950, how much of the south half was the City actually using?

A. Approximately 25 acres.

Q. That is embraced in the garbage dump and also in the Merrill Field Runway?

A. I would say that would be about right for that area, 25 acres.

Q. To your knowledge, does the City make any use of any other south half at that time or since that time?

A. No, they have not, to my knowledge.

Q. Presently are there any gravel excavation operations going on in the south half?

A. Anchorage Sand and Gravel, The Road Commission and various mining operations going on. I don't know just what all.

Q. Approximately what distance are those operations that is actually used by the City?

A. Half a mile, perhaps.

The Court: Would you state, Mr. Saxton, how far the operation just described is from the area that is actually used now by the City? [33]

A. About half a mile.

Q. Closest surface, that is the closest operation that is used by the City?

A. That is right.

Mr. Arnell: I believe that is all.

Mr. Stewart: One question, your Honor.

(Testimony of Ellsworth E. Saxton.)

Cross-Examination

By Mr. Stewart:

Q. Did you have knowledge that the Road Commission was using a gravel pit in this area in October, 1950?

A. I don't believe they were using it in October, but they had used it previously.

Q. It had been used? A. Yes.

Mr. Stewart: That is all. Your Honor, I have no objection to the statement.

Mr. Arnell: That is all.

The Court: Have you any other evidence to put on?

Mr. Arnell: No.

The Court: Then you may proceed with the arguments. [34]

United States of America,
Territory of Alaska.

I, Iris L. Stafford, Official Reporter of the above-entitled Court, hereby certify:

That the foregoing is a true and correct transcript of excerpts of the proceedings had on Motion to Dismiss in the above-entitled matter taken by me in stenograph in open court at Anchorage, Alaska, on the 25th of June, 1953, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD. [35]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, Wm. A. Hilton, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure and pursuant to designations of counsel, I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceeding, including the transcript of record on appeal of excerpts of proceedings on motion to dismiss, such record being the complete record of the cause pursuant to the said designation.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above-entitled cause by the above-entitled Court on September 15, 1953, to the United States Court of Appeals at San Francisco, California.

[Seal] /s/ WM. A. HILTON,

Clerk of the District Court for the District of
Alaska, Third Division.

[Endorsed]: No. 14190. United States Court of Appeals for the Ninth Circuit. Superior Sand and Gravel Mining Co., Inc., a Corporation, Appellant, vs. Territory of Alaska, Appellee, and Vernon C. Schubert, Dorothy Schubert, Clarence D. Smith, Jr., Lillian E. Smith, Eugene E. Saxton, Dorothy M. Saxton, Ellsworth E. Saxton and Grace D. Saxton, Co-Partners Doing Business as the Northern Construction Association, and Ellsworth E. Saxton, as Agent for Said Association, Appellants, vs. Territory of Alaska, Appellee. Transcript of Record. Appeals from the District Court for the District of Alaska, Third Division.

Filed January 8, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals, Ninth Circuit
No. 14190

SUPERIOR SAND AND GRAVEL MINING
CO., INC., a Corporation,

Plaintiff and Appellant,

vs.

TERRITORY OF ALASKA,

Defendant and Appellee.

VERNON C. SCHUBERT, et al.,

Defendant and Appellant,

vs.

TERRITORY OF ALASKA,

Defendant and Appellee.

NOTICE OF ADOPTION OF STATEMENT OF
POINTS AND DESIGNATION OF RECORD

Superior Sand and Gravel Mining Co., Inc., a corporation, plaintiff and appellant in the above-entitled action, does hereby adopt its statement of points and designation of record appearing in the typewritten transcript of record in the above-entitled matter.

Dated at Anchorage, Alaska, this 12th day of January, 1954.

/s/ JOHN E. MANDERS,

Attorney for Superior Sand and Gravel Mining Co.,
Inc., Plaintiff and Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 15, 1954.

[Title of Court of Appeals and Cause.]

Nos. A-8325, A-8422 and A-8423

ADOPTION OF STATEMENTS

Now come the appellants, Vernon C. Schubert, Dorothy Schubert, Clarence D. Smith, Jr., Lillian E. Smith, Eugene E. Saxton and Grace D. Saxton, associated as the Northern Construction Association, and Ellsworth E. Saxton, as agent for said association, pursuant to the provisions of Rule 17-6 of this Court, by their attorney of record, E. L. Arnell, and hereby adopt as their statement of points to be relied upon in this appeal the statement of points which heretofore was filed in the District Court for the District of Alaska, and which heretofore has been filed as a part of the typewritten transcript on appeal.

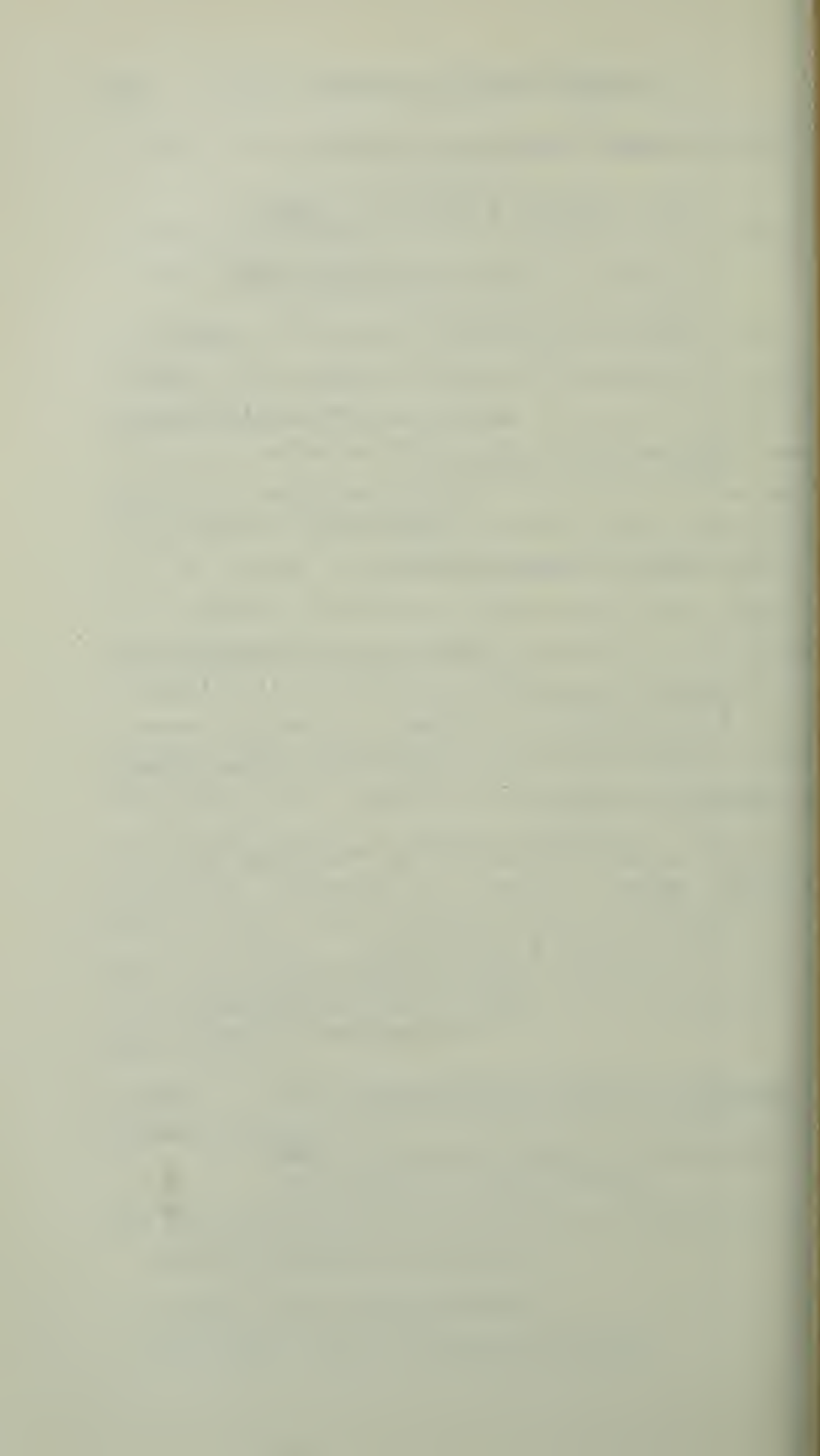
Dated at Anchorage, Alaska, this 13th day of January, 1954.

/s/ E. L. ARNELL,

Attorney for Northern
Construction Association.

Receipt of copy acknowledged.

[Endorsed]: Filed January 23, 1954.



United States Court of Appeals
For the Ninth Circuit

SUPERIOR SAND AND GRAVEL MINING
Co., Inc., a corporation, *Appellant*,

vs.

TERRITORY OF ALASKA, *Appellee*,
and

VERNON C. SCHUBERT, DOROTHY SCHU-
BERT, CLARENCE D. SMITH, JR., LIL-
LIAN E. SMITH, EUGENE E. SAXTON,
DOROTHY M. SAXTON, ELLSWORTH E.
SAXTON and GRACE D. SAXTON, Co-
Partners Doing Business as the
NORTHERN CONSTRUCTION ASSOCIA-
TION, and ELLSWORTH E. SAXTON, as
Agent for Said Association,
Appellants,

vs.

TERRITORY OF ALASKA, *Appellee*.

Appeal from the District Court of the
Territory of Alaska, Third Division.

BRIEF OF APPELLANT,

SUPERIOR SAND AND GRAVEL MINING CO., INC.,
A CORPORATION.

JOHN E. MANDERS,
Loussac-Sogn Building, Anchorage, Alaska,
*Attorney for Appellant, Su-
perior Sand and Gravel
Mining Co., Inc., a cor-
poration.*

FILED

JUN 17 1954

PAUL P. O'BRIEN
CLERK

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No. 14,190

IN THE

United States Court of Appeals For the Ninth Circuit

SUPERIOR SAND AND GRAVEL MINING
Co., INC., a corporation,

Appellant,

VS.

TERRITORY OF ALASKA,
and

Appellee,

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE D. SMITH, JR., LILLIAN E. SMITH, EUGENE E. SAXTON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON and GRACE D. SAXTON, Co-Partners Doing Business as the NORTHERN CONSTRUCTION ASSOCIATION, and ELLSWORTH E. SAXTON, as Agent for Said Association,

Appellants,

VS.

TERRITORY OF ALASKA,

Appellee.

Appeal from the District Court of the
Territory of Alaska, Third Division.

BRIEF OF APPELLANT,
SUPERIOR SAND AND GRAVEL MINING CO., INC.,
A CORPORATION.

STATEMENT OF THE CASE.

The land involved is Section 16, Township 13 North, Range 3 West, Seward Meridian, Anchorage Precinct, Third Judicial Division, Territory of Alaska. It contains valuable deposits of sand and gravel (R. 33).

The Act of March 4, 1915, 38 Stat. 1214, 48 U.S.C.A. Section 353, reserved Sections 16 and 36 in each township in Alaska, not known to be mineral in character at the time of survey, from sale or settlement for the support of the schools, and gave the Territory of Alaska the right to lease such sections.

The Act of August 7, 1939, 53 Stat. 1243, amended the 1915 Act to authorize, among other things, the disposition of school sections under the mining and mineral leasing laws of the United States, upon conditions enumerated in the statute.

Late in 1950, the predecessors of Superior Sand and Gravel Mining Company, Inc., appellant (R. 9) and Schubert, *et al.*, appellants (R. 5 and R. 14), and Anchorage Sand and Gravel Company, Inc., (R. 4) located placer mining claims on this school section. At that time, the section was under lease to others (R. 53) by the Territory of Alaska. Also, early in 1950, Anchorage Sand and Gravel Company, Inc., contracted with the United States for the removal of gravel from a portion of the section, under the Materials Act (Act of July 31, 1947, 61 Stat. 681, 43 U.S.C.A. Sec. 1185, *et seq.*) (R. 4).

In 1952, appellants Schubert, *et al.*, applied for patent under the placer mining laws (R. 6 and R. 15).

Superior Sand and Gravel Mining Co., Inc., appellant (R. 16), and Anchorage Sand and Gravel Company, Inc., (R. 6), filed adverse claims in the Land Office and commenced these proceedings (R. 3 and R. 8), under 30 U.S.C.A. Section 30 and 48 U.S.C.A. Section 386, to determine the rights of the adverse mineral claimants. The Territory of Alaska, appellee, named defendant in each of the actions, moved to consolidate the actions (R. 27). This motion was granted (R. 30). The Territory of Alaska also moved to dismiss the complaints (R. 29). After argument, the trial Court entered its opinion (R. 32), and its order (R. 40), dismissing the complaints with prejudice. This appeal followed.

SPECIFICATION OF ERRORS.

The Court erred as a matter of law in dismissing the complaints because:

1. The determination of the mineral or non-mineral character of the land is solely for the determination of the Land Department of the United States, and not for the Court.

2. Sand and gravel were minerals subject to location under the mining laws of the United States in 1950 (R. 36).

3. School lands in Alaska were subject to disposition under the mining laws of the United States during 1950.

4. The Materials Act did not prevent mining locations for sand and gravel in 1950 (R. 37).

Specification of errors Nos. 1 and 3, although extensively argued orally and by written briefs, were disposed of by the Court as follows (R. 38):

“The questions argued on behalf of Northern Construction Association and the Superior Sand and Gravel Mining Co., Inc., in opposition to the motion to dismiss, are either not presented by the record or are not involved and, hence, do not merit extended discussion.”

JURISDICTION.

Jurisdiction of the District Court is conferred by Title 48, U. S. Code, Section 101. Procedure in the District Court since July 18, 1949, has been controlled by the Federal Rules of Civil Procedure; extended to the Courts of the Territory of Alaska on that date.

Jurisdiction of this Court to review the judgment of the District Court is conferred by New Title 28, United States Code, Sections 1291 and 1294 and the appeal is governed by the Federal Rules of Civil Procedure.

ARGUMENTS AND AUTHORITIES.

FIRST ARGUMENT.

The Court erred as a matter of law in dismissing the complaint because:

1. The determination of the mineral or non-mineral character of the land is solely for the determination of the Land Department of the United States, and not for the Court.

It has been consistently held for many years that the decision as to the mineral or non-mineral character of land is for the Land Department and not for the Courts:

In the case of *Burfenning v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.* (1896), 163 U.S. 321, 323, it is stated:

“It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be reexamined. *Johnson v. Towsley*, 13 Wall. 72; *Smelting Company v. Kemp*, 104 U.S. 636; *Steel v. Smelting Company*, 106 U.S. 447; *Wright v. Roseberry*, 121 U.S. 488; *Heath v. Wallace*, 138 U.S. 573; *McCormick v. Hayes*, 159 U.S. 332.”

In the case of *Cosmos Exploration Company v. Gray Eagle Oil Company* (1903), 190 U.S. 301, it was held that the Land Department has the statutory right to make rules and regulations, and that the Courts will take judicial knowledge of such rules and regulations as shall be made by it regarding the sale or exchange of public lands. It was further held at page 314:

“What may be the decision of the Land Department upon these questions in this case, cannot be known, but until the various questions of law and fact have been determined by that Department in favor of complainant it cannot be said that it has a complete equitable title to the land selected. ‘* * * The Government has provided a special tribunal for the decision of such a question arising out of the administration of public land laws, and that jurisdiction cannot be taken away from it by the Courts. *U.S. v. Schurz*, 102 U.S. 378, 395.’

* * * that the courts have no jurisdiction to determine questions of fact with reference to the public lands while the claims of the respective parties are pending before the Land Department is axiomatic * * * When, therefore, the jurisdiction of the Land Department is once set in motion, and that tribunal is engaged in the investigation which necessarily involves a determination of the character of the land, and which determination would be conclusive, the courts are precluded from trying or determining the question.”

Lindley, Mines, Vol. 1, Section 108, page 188-9.

Thus, Congress has in effect designated the Land Department as a "legislative" Court:

"* * * the Congress, in exercising the powers confided to it, may establish 'legislative' courts (as distinguished from 'constitutional courts in which the judicial power conferred by the constitution can be deposited') which are to form a part of the government of the territories or of the District of Columbia, or to serve as special tribunals 'to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it'. But 'the mode of determining matters of this class is completely within Congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals * * * Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the Congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans."

Crowell v. Benson, 285 U.S. 22, 50.

This does not leave the Territory of Alaska without a tribunal in which it can be heard. 43 C.F.R. Section 221.1 permits contests or protests to be initiated by any person claiming an interest in the land; Sections 185.89 to 185.92 provide the procedures for protests and contests; 30 U.S.C.A. Section 40 provides the

manner of taking testimony and proofs relating to contests as to the mineral or agricultural character of land.

SECOND ARGUMENT.

The Court erred as a matter of law in dismissing the complaints because:

2. Sand and gravel were minerals subject to location under the mining laws of the United States in 1950 (R. 36).

As late as 1942, in *United States v. Barngrover*, 57 Land Decisions 533, the Land Department had followed the rule that "any substance found in nature, having sufficient value, separated from its situs as part of the earth, to be mined, quarried, or dug for its own sake or its own specific uses is locatable and enterable under the mining laws." In *Layman v. Ellis*, 52 L.D. 714, decided in 1929, the Land Department expressly repudiated the rule that gravel, since it has not been classified as a mineral by standard authorities, was not to be considered a valuable mineral deposit under the mining laws. The *Ellis* case expressly overruled *Zimmerman v. Brunson*, 39 L.D. 310, decided in 1910. In the *Ellis* case an extended discussion of the value of gravel for its use in the mechanical arts occurs along with a discussion of its unique physical characteristics, which make gravel distinguishable from other rock and impart to it its value in the natural state. These distinguishing

physical characteristics, even though gravel has no definite chemical composition, entitle it to be classified as a mineral when they give to gravel its commercial value. The *Ellis* case took pains to point out that in the *Zimmerman* case the reasons relied on for not including gravel within the term mineral, as defined in 1 *Lindley on Mines* 163, 3rd Ed., and *Pacific Coast Marble Co. v. Northern Pacific R. R. Co. et al.*, 25 L.D. 233, were unsubstantial, and that the *Zimmerman* case had been criticized by leading text writers on the subject. In *Taking of Sand and Gravel from Public Lands* case, 54 L.D. 294, decided in 1933, the *Ellis* case was reaffirmed as to the taking of sand and gravel from public domain land under a placer mining claim.

In *United States v. Aitken* (1913), 25 Philippine 7, the question of whether commercial gravel suitable for building and construction material was locatable under the placer mining laws of the Philippines is discussed at length commencing on page 12. The Act of Congress dated July 1, 1902, was the statutory mining law involved in this case. Section 20 therein, except for its limited application to public lands in the Philippine Islands, is the exact counterpart of 30 U.S.C.A. 21. Section 21 of the Act of Congress dated July 1, 1902 is the counterpart of 30 U.S.C.A. 22, but with some differences in wording due to the place of application in each instance. These differences do not seem to materially change the legislative intent in each instance, so that the Philippine Court's de-

termination has application to the United States mining laws on this question.

The determination that commercial gravel is not a mineral or a building stone subject to location under the placer mining laws based on these four grounds:

1. That commercial gravel is not included in the "Scientific" definition of mineral.

2. That it is not included in the "Legal" definition of mineral.

3. That "on the broad grounds of public policy" it would be unwise for the Government to divest itself of the ownership of road building materials in the face of its obligation to use them in the exercise of one of its most important functions.

4. A rule of statutory interpretation of the mining laws which states that "Where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, that construction should be adopted which will support the claim of the Government rather than the claim of the individual."

At page 15 in the *Aitken* case the Philippine Court states that the scientific definition of the term minerals is narrower than the legal definition and that they do not rely on the scientific definition in reaching their decision. Other Courts had already held that substances such as coal, asphalt, phosphate rock etc., having no definite chemical composition and being

of organic origin are within the legal definition of minerals.

In concluding that commercial gravel is not a mineral or a building stone within the mining laws, the Court relied heavily upon the Land Department decision of *Zimmerman v. Brunson*, 39 L.D. 310 (1910) cited at page 18. The case of *Layman v. Ellis*, discussed supra, overruled the *Zimmerman* case both as to result and the underlying theory. Land Department decisions thus no longer sustain the *Aitken* case on the second ground relied upon.

In its discussion pertaining to public policy, the Philippine Court attempts to buttress its legal position by invading the province of Congress. Congress must appropriate money for roads. Since it has not excluded gravel from the operation of the mining laws, as it could have done in reliance upon these same public policy grounds, the inference is clear that it did not wish to do so. This is especially evident upon a consideration of 54 L.D. 294 (1933) which involved the taking of gravel from public domain lands by state, county, and mineral entrymen, for road building purposes. The discussion at page 296 of 54 L.D. is particularly pertinent to statements on page 21 in the *Aitken* case, regarding speculation in gravel lands to the detriment of the exercise of the road building function of the Government. The Land Department in 54 L.D. 294 disposes of the public policy grounds relied on in the *Aitken* case.

The rule of statutory interpretation relied on in the *Aitken* case is limited, by its own terms, to contests between a claimant and the Government. To the extent that its decision is based on this ground, the *Aitken* case is distinguishable on its facts, from cases between adverse private claimants between themselves, and as against the Territory of Alaska under 38 Statutes 1214. In the instant case, the Territory of Alaska cannot claim to come within this rule of statutory interpretation cited in the *Aitken* case.

After a consideration of the bases of its decision, the *Aitken* case does not appear to be a well reasoned opinion to support the proposition that commercial gravel is not locatable under the mining laws and that it is not a valuable mineral deposit under the mining laws.

Various other non-metallic substances have been held to be subject to entry under the placer mining laws. They include:

Guano:

Richter v. Utah, 27 L.D. 95.

Building stone:

Pacific Coast Marble Co. v. N.P.R.R. Co., 25 L.D. 233;

Forsythe v. Weingart, 27 L.D. 680.

Limestone:

Morrill v. Northern Pacific R. R. Co. et al., 30 L.D. 475.

(Limestone valuable for purpose of manufacture is a mineral within the mining laws:

Dunbar Lime Co. v. Utah-Idaho Sugar Co., 17 Fed. 2d 351 (1926), at p. 355.)

Sandstone:

Beaudette v. N.P.R.R. Co., 29 L.D. 248.

Slate and Marble:

Schrimpf v. N.P.R.R. Co., 29 L.D. 327.

Granite:

Northern Pacific Railroad Co. v. Soderberg, 188 U.S. 526.

Sand and Gravel in place:

Cline v. Henry et al., 239 S.W. 2d 205 (1951), at p. 209.

Bentonite:

149 P. 2d 142 (1944), at p. 145, 146.

Whetstone:

85 Fed. Supp. 157 (1949), at p. 162.

Stone quarried:

93 N.E. 2d 500 (1950), p. 503.

In all these cases, the test used to determine whether the lands are enterable under the placer mining laws was their value for the deposits as against the use of the land for agriculture.

“Mining” as used in the Bankruptcy Act includes quarrying or open workings. *Burdick v. Dillon*, 144 Fed. Rep. 737 (1906), at p. 741. Stripping for limestone is mining under the Internal Revenue Code.

Arrel et al. v. Collector, 52 Fed. Supp. 635 (1935), at p. 636.

The leading judicial decisions favorable to the inclusion of gravel as a valuable mineral deposit are:

Loney v. Scott (1910), 112 Pac. 172;

Northern Pacific Railroad Co. v. Soderberg (1903), 188 U.S. 526, and

Webb v. American Asphaltum Co. (1907), 157 Fed. 203.

In *Loney v. Scott*, building sand was held to be mineral within the meaning of United States mining statutes and subject to entry under placer claims. This decision was based on the profitable market for building sand as used in the mechanical arts.

In the *Webb* case, the Court stated at p. 204 that a placer claim is a claim of a tract of land for the sake of loose deposits on or near its surface in contrast to lode claims where the valuable deposits are in lodes or veins in rock in place. In *Reynolds v. Iron Silver Mining Co.*, 116 U.S. 687 (1886), at p. 695, the Court speaks of differing methods of obtaining deposits from lode and placer mining claims. In the latter, "the usual way is to take the soft earthy matter in which the particles of mineral are loosely mingled, and by filtration separate the one from the other." In the case of deposits found in lodes, "following this vein into its stony case in the bowels of the earth, detaching and bringing it to the surface and subjecting it to crushing, melting and other processes

by which the precious metal is separated from the ore of which it is a part.” 1 *Lindley on Mines*, 90, 3d Ed., refers to *Bainbridge on Mines*, 5th Ed. 4, wherein it is stated that “minerals are not the less minerals because they are gotten by quarrying as distinguished from mining.” Thus, Congressional intent as to what are minerals is not limited to those which must be removed by extraction and mining. Placer claims, by definition, may be susceptible to easy removal as a part of the earth near or upon the surface. See also: *Clipper Mining Co. v. Eli Mining and Land Co.* (1904), 194 U.S. 220, at p. 228.

Since the mining law distinguishes between lode or vein and placer claims, the word “discovery” as used in 30 U.S.C.A. 23 must be construed in its context, wherein it refers to veins or lodes. “Discovery”, as used in 30 U.S.C.A. 23, does not necessarily apply to placer locations.

In the light of the decided cases discussed and the statutes construed the conclusion is inescapable that the Land Department’s rule since *Layman v. Ellis* in 1929, should be followed here. *Loney v. Scott* is ample judicial authority for this jurisdiction, particularly in view of the settled rule of the Land Department adjudications. The *Aitken* case was tolerable to the extent of its reliance upon *Zimmerman v. Bronson*. In view of the express repudiation of the rule therein by *Layman v. Ellis*, the *Aitken* case should have no effect as a precedent in the instant case.

THIRD ARGUMENT.

The Court erred as a matter of law in dismissing the complaints because:

3. School lands in Alaska were subject to disposition under the mining laws of the United States during 1950.

38 Stat. 1214, March 4, 1915, provides for the reservation from sale or settlement for the support of the common schools in the Territory of Alaska sections numbered 16 and 36 in every township, when the public lands of the Territory are surveyed under direction of the United States Government. There is a proviso that the reserve is not applicable to known mineral lands in the numbered sections at the date of the acceptance of survey, and that the proceeds received by the United States from mineral lands in the numbered sections are to inure to the benefit of the public schools of Alaska. The first proviso allows the Territory the selection in lieu of indemnity lands, should the numbered sections specified be fractional or otherwise appropriated under or by any Act of Congress before the survey.

53 Stat. 1243, August 7, 1939, added to 38 Stat. 1214, providing, among other things, that "such (the reserved) lands and the minerals therein shall be subject to disposition under the mining and mineral leasing laws of the United States * * *" Further, that "any leases issued by the Territory after a valid appropriation of such reserved lands under the mining laws or the mineral leasing laws of the United States

shall be with due regard to the rights of the mineral claimant.”

Reading these two statutes together, it seems clear that (1) known mineral lands at time of survey are excepted from the reservation and (2) that subsequently discovered minerals on reserved lands are locatable under the mining laws upon conditions providing for compensation to any Territorial lessee for damages to his leasehold.

53 Stat. 1243 was repealed by Act, March 5, 1952, but this is not material to a discussion of rights existing in November, 1950. In the light of the *Sweet* case, discussed infra, the present form of 48 U.S.C.A. 353 still does not seem to evidence Congressional intent to reserve mineral lands to the Territory.

U. S. v. Sweet (1918), 245 U.S. 563, construes section 6 of the Utah Enabling Act, 28 Stat. 107, granting numbered sections to that State upon its admission for support of common schools. The grant does not expressly include or exclude mineral lands. Here, lands known to be valuable for coal before Utah became a state were involved. A closely related section of the same enabling Act states “* * * and such land (the numbered sections granted) shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be conveyed for school purposes only.” Despite the strong language of this Act, which taken alone evinces an intent to make a complete grant to the State, the Court says,

at p. 566, that the ultimate question for decision is whether the school land grant to Utah embraces mineral land. In answering this question in the negative, the Court says that this Act must be read in the light of other statutes and a settled public policy in respect to mineral lands (p. 567). After discussing *Mining Co. v. Consolidated Mining Co.*, 102 U.S. 167, which construed the school land grants to California as not intending to convey mineral lands, and 26 Stat. 796, defining the indemnity or lieu lands to which a State or Territory is entitled in respect of its school grants, should the numbered sections prove to be mineral, the Court says at p. 572 "that the school grant to Utah must be read in the light of the mining laws, the school land indemnity law, and the settled public policy respecting mineral lands, and not as though it constituted the sole evidence of the legislative will." When so read, the Court says that it does not disclose a purpose to include mineral lands and that the long prevailing policy of Congress is to dispose of mineral lands only under laws specially including them. *Work v. Braffet* (1927), 19 Fed. 2d 666, refers to the *Sweet* case and follows the rule as settled law.

44 Stat. 1026, 43 U.S.C.A. 870 (1927), extends the school grants to the several states to embrace numbered mineral sections, thus reversing the *Sweet* case doctrine and giving a clear expression of the intent of Congress on the matter. However, 870 (c) excludes all lands in the Territory of Alaska from the provisions of 43 U.S.C.A. 870.

In the light of Congressional intent, as evidenced by 53 Stat. 1243 and 44 Stat. 1026, it seems clear that mineral lands in numbered school sections reserved from sale or settlement are locatable under the United States mining laws, even though they were not known to be mineral in character at the time of survey. 38 Stat. 1214 is not a "grant" of lands to the Territory, as was Section 6 of the Utah Enabling Act, but merely reserves certain lands from sale or settlement. It does not reserve known mineral lands. 53 Stat. 1243 allows reserved lands which are mineral in character to be subject to disposition under the mining laws. The indemnity provisions of 38 Stat. 1214 give force to the view that Congress intends to dispose of mineral lands only under laws specifically doing so, and that they are not included in school land grants, much less reservations from sale or settlement. The *Sweet* case doctrine still controls mineral school lands in Alaska. What was given the Territory of Alaska by 38 Stat. 1214 is less than that given by Section 6 of the Utah Enabling Act. No present or future grant of lands to the Territory is made, but a trust is imposed in favor of the Territory on the proceeds of the reserved lands.

FOURTH ARGUMENT.

The Court erred as a matter of law in dismissing the complaints because:

4. The Materials Act did not prevent mining locations for sand and gravel in 1950 (R. 37).

The Act of July 31, 1947, c. 406, Section 1, 61 Stat. 681, 43 U.S.C.A. Section 1185:

“The Secretary of the Interior, under such rules and regulations as he may prescribe, may dispose of materials including but not limited to sand, stone, gravel, yucca, manzanita, mesquite, cactus, common clay, and timber or other forest products, on public lands of the United States if the disposal of such material (1) is not otherwise expressly authorized by law, including the United States mining laws, (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest. Such materials may be disposed of only in accordance with the provisions of Sections 1185-1187 of this title and upon the payment of adequate compensation therefor * * *”

This Act also provides that the proceeds of the sale of materials on Alaska school lands shall be paid to the Territory of Alaska for school purposes. The District Court in its opinion (R. 37) considers this Act as a close analogy to the Mineral Lands Leasing Act (coal, oil, gas, phosphates, etc.) and therefore decided that sand and gravel could only be disposed of under the Materials Act and not under the general mining laws of the United States.

Appellants contend that the Materials Act does not restrict or modify the general mining laws, but rather supplements those laws by adding an alternative method of disposal. For example, the opinion of the trial Court would repeal the provisions of 30 U.S.C.A.

Section 161 extending the general placer mining laws to building stone. Implied repeals are not favored and will not be adopted unless conditions so require. The Materials Act refers only to the disposal of the materials and not to the purchase of the lands containing the materials, while the mining laws (See 30 U.S.C.A. Section 22) permit the occupation and purchase of the lands themselves, as well as the right to extract the minerals. The term "mineral" in the general mining laws has been interpreted to mean a variety of items; the word "materials" in the Materials Act would cover an even greater variety, as is evidenced by the specific inclusion of four items of vegetation (yucca, manzanita, mesquite, and cactus). To hold that the Materials Act provides an exclusive procedure could well mean the repeal of all prior mining laws, including the Mineral Lands Leasing Act, for all minerals are materials, but materials are not necessarily minerals. There is no point of compromise; either the Materials Act supersedes the mining laws or it supplements them; there is no criterion in the Act for determining that it supersedes the mining laws as to some items (for instance stone which is specifically mentioned) but not as to others.

Further, the Materials Act alone cannot be considered as constituting the sole evidence of the legislative will, but must be read in connection with the mining laws, the Mineral Lands Leasing Act, the Building Stone Act, and all other relevant provisions of the statutes, and the settled public policy respect-

ing mineral lands. On such a basis, it could not be considered that Congress or the Department of the Interior intended that the Materials Act should supersede the mining laws. If Congress had so intended, it would not have been necessary in 1952 to repeal the 1939 Act permitting mining locations on Alaska school lands—keeping in mind that the mining claims of appellants were the moving cause of the 1952 Act and that the legislative history of the 1952 Act recognizes the validity of the mining locations of appellants.

Finally, it is of special note that the operation of the Materials Act is permissive and therefore cannot be construed as conclusive.

FIFTH ARGUMENT.

CONCLUSION.

The first and most important point raised by appellants is that the determination of the mineral or non-mineral character of the land is solely for the determination of the Land Department of the United States, and not for the Court.

This is a special statutory proceeding designed to serve a specific purpose (30 U.S.C.A. Sections 29 and 30). The statute does not state or imply that the trial Court may usurp the authority of the Land Department for the determination of questions of fact which are solely within the jurisdiction of that Department. A ruling by this Court that sand and gravel are not

minerals within the meaning of the placer mining laws would be an unauthorized assumption of the jurisdiction of the Land Department.

The Territory of Alaska attempted, by its motion to dismiss, to do indirectly that which it cannot do directly. The Territory knows that it would be next to impossible to induce the Land Department to overrule its holding of many years standing to the effect that sand and gravel are minerals within the mining laws. Such a ruling was made by the Land Department as a general rule to apply to all the States and Territories, and the Department undoubtedly would not upset such a ruling merely because the public interest of the schools of the Territory of Alaska might be best served in this one instance by so doing. The Territory felt that the trial Court might be swayed to overlook the far reaching nation-wide importance of overruling the established policies of land disposal and thus make a decision favorable to the Territorial position because of local importance and local sentiment. This is certainly the exact circumstance that Congress was attempting to prevent when it clothed the Land Department with nation-wide authority to decide the character of land under general rules and regulations.

A decision by this Court as to the character of the land would invalidate the entire procedural safeguards established by the Land Department for the determination of this question. It would, in effect, repeal the regulatory and rule making powers of the

Land Department as to public lands and throw every protest or contest, as well as adverse claims, into the Courts.

The mineral claimants, being all parties other than the Territory, must have a decision on the status of their respective possessory rights as between themselves before they can return to the Land Office and complete the necessary steps to perfect their claims and secure patents, if they are entitled to patents. Affirmance by this Court of the order of the trial Court would forever bar them from such further proceedings. However, the reversal by this Court of the order of the trial Court would in no wise bar the Territory from contesting or protesting the mineral character of the land or even the right of the mineral claimants to locate mineral claims of any description on the lands involved; the Territory can do so before the Land Department at any time prior to the issuance of patent (43 C.F.R. 185.89).

A determination of this first point in favor of appellants disposes of the entire appeal for the same reasoning applies to the other three points. Every point in this appeal should be decided by the Land Department under its exclusive jurisdiction in the disposal of public lands and not by the Court.

If this Court should decide adversely to appellants, then it should consider the remaining points:

2. Sand and gravel were minerals subject to location under the mining laws of the United States in 1950 (R. 36).

3. School lands in Alaska were subject to disposition under the mining laws of the United States during 1950.

4. The Materials Act did not prevent mining locations for sand and gravel in 1950 (R. 37).

It is respectfully submitted that the judgment dismissing the complaints in this cause be reversed and that the Court determine that gravel is a valuable mineral deposit under the mining laws of the United States and that school lands in Alaska are subject to disposition under the mining laws of the United States and were so subject during the year 1950.

Dated, Anchorage, Alaska,

May 28, 1954.

Respectfully submitted,

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No. 14,190

IN THE

United States Court of Appeals
For the Ninth Circuit

SUPERIOR SAND AND GRAVEL MINING CO., INC.,
a corporation,

Appellant,

vs.

TERRITORY OF ALASKA,

Appellee,

and

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE
D. SMITH, JR., LILLIAN E. SMITH, EUGENE E. SAX-
TON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON
and GRACE D. SAXTON, Co-Partners Doing Business
as the Northern Construction Association, and ELLS-
WORTH E. SAXTON, as Agent for Said Association,

Appellants,

vs.

TERRITORY OF ALASKA,

Appellee.

Appeal from the District Court of the
Territory of Alaska, Third Division.

BRIEF OF APPELLANTS SCHUBERT, ET AL., DOING BUSINESS
AS THE NORTHERN CONSTRUCTION ASSOCIATION, AND
ELLSWORTH E. SAXTON, AS AGENT FOR SAID ASSOCIATION.

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FILED

JUN 29 1954

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Appellant,

vs.

TERRITORY OF ALASKA,

Appellee,

and

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE
D. SMITH, JR., LILLIAN E. SMITH, EUGENE E. SAX-
TON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON
and GRACE D. SAXTON, Co-Partners Doing Business
as the Northern Construction Association, and ELLS-
WORTH E. SAXTON, as Agent for Said Association,

Appellants,

vs.

TERRITORY OF ALASKA,

Appellee.

Appeal from the District Court of the
Territory of Alaska, Third Division.

BRIEF OF APPELLANTS SCHUBERT, ET AL., DOING BUSINESS
AS THE NORTHERN CONSTRUCTION ASSOCIATION, AND
ELLSWORTH E. SAXTON, AS AGENT FOR SAID ASSOCIATION.

I. JURISDICTIONAL STATEMENT.

The jurisdiction of the District Court for the Ter-
ritory of Alaska was invoked under the Act of March

3, 1952, c. 462, 43 Stat. 1144, 1145, being 30 U.S.C.A., Sections 29 and 30; and the Act of June 7, 1910, c. 265, 36 Stat. 459, being 48 U.S.C.A., Section 386 and 48 U.S.C.A., Section 101. Jurisdiction of the Court of Appeals rests on the Federal Judicial Code and the Federal Rules of Civil Procedure.

II. STATEMENT OF THE CASE.

The land involved is Section 16, Township 13 North, Range 3 West, Seward Meridian, Anchorage Precinct, Third Judicial Division, Territory of Alaska. It contains valuable deposits of sand and gravel (R. 33).

The Act of March 4, 1915, 38 Stat. 1214, 48 U.S.C.A. Section 353, reserved Sections 16 and 36 in each township in Alaska, not known to be mineral in character at the time of survey, from sale or settlement for the support of the schools, and gave the Territory of Alaska the right to lease such sections.

The Act of August 7, 1939, 53 Stat. 1243, amended the 1915 Act to authorize, among other things, the disposition of school sections under the mining and mineral leasing laws of the United States, upon conditions enumerated in the statute.

Late in 1950, the predecessors of Superior Sand and Gravel Mining Company, Inc., Appellant (R.9) and Schubert, *et al.*, Appellants (R.5 and R.14), and Anchorage Sand and Gravel Company, Inc., (R.4) located placer mining claims on this school section. At

that time, portions of the surface of the section were under lease to others (R.53) by the Territory of Alaska. Also, early in 1950, Anchorage Sand and Gravel Company, Inc., contracted with the United States for the removal of gravel from a portion of the section, under the Materials Act (Act of July 31, 1947, 61 Stat. 681, 43 U.S.C.A. Sec. 1185, *et seq.*) (R.4).

In 1952, Appellants Schubert, *et al.*, applied for patent under the placer mining laws (R.6 and R.15). Superior Sand and Gravel Mining Co., Inc., Appellant (R.16), and Anchorage Sand and Gravel Company, Inc., (R.6), filed adverse claims in the Land Office and commenced these proceedings (R.3 and R.8), under 30 U.S.C.A. Section 30 and 48 U.S.C.A. Section 386, to determine the rights of the adverse mineral claimants. The Territory of Alaska, Appellee, named defendant in each of the actions, moved to consolidate the actions (R.27). This motion was granted (R.30). The Territory of Alaska also moved to dismiss the complaints (R.29). After argument, the Trial Court entered its opinion (R.32), and its Order (R. 40), dismissing the complaints with prejudice. This appeal followed.

III. SPECIFICATION OF ERRORS.

The Trial Court erred as a matter of law in dismissing the complaints herein, for the following reasons:

1. Sand and gravel are minerals, subject to placer location under the mining laws of the United States.
- 2.a Under the mining laws of the United States a valuable discovery may validly be made of sand and gravel found on the surface.
- 2.b Whether any specific deposit of sand and gravel constitutes such a valuable discovery which will make the lands in question mineral in character, so as to give a locator a preference right over agricultural claimants, is solely for the determination of the Land Department of the United States and not for the Court in the type of proceeding here involved.
3. School lands in Alaska were subject to disposition under the mining laws of the United States during 1950, the time of the locations in question.

The jurisdictional portion (para. 2b) of Specification of Error Number Two and all of Specification of Error Number Three, although extensively argued orally and by written briefs, were disposed of by the Trial Court in its opinion as follows (R.38):

“The questions argued on behalf of Northern Construction Association and the Superior Sand and Gravel Mining Co., Inc., in opposition to the motion to dismiss, are either not presented by the record or are not involved and, hence, do not merit extended discussion.”

IV. ARGUMENTS AND AUTHORITIES.

FIRST ARGUMENT.

SAND AND GRAVEL ARE MINERALS, SUBJECT TO PLACER LOCATION UNDER THE MINING LAWS OF THE UNITED STATES.

The mining laws of the United States do not contain a definition of the term "mineral" as that word is used with respect to the discovery of mineral deposits, the location of mining claims, and the purchase of mineral land by mining claimants. Accordingly, since early times, the definition of the term "mineral" has become the subject-matter of interpretation both by the courts and by those executive departments of the government which are charged with the disposition of mineral lands under the mining laws. The Trial Court, in its opinion (R. 35), sets forth one of the earliest interpretations given to the word "mineral" by the Land Department, issued within a year after the enactment of the mining law of 1872, and which is quoted in Lindley on Mines, (3rd ed.), 163, as follows:

"In the sense in which the term 'mineral' was used by Congress, it seems difficult to find a definition that will embrace what mineralogists agree should be included. * * * From a careful examination of the matter, the conclusion I reach as to what constitutes a valuable mineral deposit is this: That whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantities and quality to render the land sought to be patented more valuable on this account than for the purpose of agriculture, should be treated by the office

as coming within the purview of the Mining Act of May 10, 1872.”

This rule was followed consistently in succeeding years and was embodied in a formal decision of the Land Department in *Pacific Coast Marble Co. v. Northern Pacific R.R. Co.*, 25 L.D. 233. However, by 1910 the Land Department began to except from this general rule such non-metallic substances as clay, sand and gravel.

Zimmerman v. Brunson (1910) 39 L.D. 310.

That same year an opposite conclusion was reached by the only American court of last resort to rule on the precise question of whether sand and gravel are “minerals” under the United States mining laws, when the highest court of the State of Oregon decided the case of *Loney v. Scott*, (1910), 112 P. 172.

This divergence was recognized, and the position of the Land Department criticized, by the standard authorities on the law of mining. Thus it is stated in 2 Lindley on Mines (3rd ed.), 424, as follows:

“It is not difficult to account for this divergence of opinion. The courts follow a consistent uniformly recognized principle which establishes the test of profitable marketability. The Land Department follows this principle as a general rule, but disregards it in the case of the commonplace substances such as ordinary clay, sand and gravel. We submit deferentially that the commonplace quality of a substance is not a sufficient warrant for departing from the general rule. However, as the Land Department is the

only tribunal which has the power to determine the character of land, it has the undoubted privilege of making exceptions to general rules and the courts cannot interfere with the exercise of this prerogative."

loc. cit., at p. 996

During the two decades which followed the Land Department's decision in *Zimmerman v. Brunson*, (*supra*), there followed an accumulation of economic and scientific data by that Department concerning the character of sand and gravel which, in 1929, led to a revaluation and to the ultimate reversal of the Department's previous policy of thus departing from the general rule enunciated by the courts. The new policy found its expression in the case of *Layman v. Ellis*, (1929), 52 L.D. 714.

In that case, Assistant Secretary Edwards, speaking for the Department, carefully reexamined the reasoning followed in the *Zimmerman* case, (*supra*). The decision then recites, at page 718, the data available to the Department at that time concerning sand and gravel, in the form of publications of the Geological Survey, entitled "Mineral Resources of the United States". It states that in these publications gravel and sand have uniformly been classed as a mineral resource and that they are also included in the list of the useful minerals and mineral supplies published by the United States Geological Survey. From this as well as from collected economic data pertaining to the volume, value, and applications

of sand and gravel production, the decision proceeds to conclude that "there can be no question that gravel deposits are definitely classified as a mineral product in trade and commerce and have a pronounced and widespread economic value because of the demand therefor in trade, manufacture, or in the mechanical arts." *Loc. cit.*, at p. 718.

The decision then recites the fact that in the *Zimmerman* case, (*supra*), the rule first enunciated in the *Pacific Coast Marble Co.* case, (*supra*), was quoted, but that "it was nevertheless attempted to take the deposit under consideration from under the rule, *first*, because the standard authorities have failed to classify sand and gravel as minerals, and *second*, because the deposit had no special property or characteristic giving it special value, and *third*, its chief value arose from industrial conditions peculiar to the locality where the deposit was found." *Ibid.*, at p. 719.

The decision in the *Layman* case, (*supra*), then goes into an extended examination of the standard authorities, which leads to the conclusion that these authorities *do* recognize gravel and sand as being mineral. It also considers and rejects the finding of the *Zimmerman* case, (*supra*), that gravel has no special properties or characteristics giving it special value. *Id.*, at p. 720. It goes on to say that:

"As to the third ground for exclusion in the *Zimmerman* case, it has not been shown that the gravel deposits in this case derived their value from the proximity between place of production

and use, and as heretofore indicated gravel is generally recognized as having special characteristics that render it valuable generally in the mechanical arts. The conclusion, hardly justified when the decision in the *Zimmerman* case was rendered, that the value shown was one arising chiefly from exceptional and peculiar conditions in the locality where the deposit in question was found, is not warranted under present conditions." *Id.*, at p. 720.

The decision goes on to point out that other Departments of the Federal government, such as the Treasury Department, have recognized gravel as a mineral and that the Land Department itself, in applying the rule of the *Pacific Coast Marble Co.* case, (*supra*), has recognized similar commonplace non-metallic substances, (such as volcanic ash, trap rock suitable for railroad ballast, amphibole schist usable as a building material, fractured granite suitable for embankments and as road material, etc.), as "minerals" which would make the lands in which they occurred enterable under the mining laws (citing cases).

Id., at p. 721.

The decision then concludes:

"It seems apparent in the *Zimmerman* case and cases based on the same reasoning that the rule in the *Pacific Coast Marble Co.* case was not followed, but disregarded on unsubstantial grounds. It has been vigorously criticized by leading text writers on the mining law. (See Lindley on Mines, Section 424; Snyder on Mines, Section 124.) There is no logical reason in view

of the latest expressions of the Department why, in the administration of the Federal mining laws, any discrimination should be made between gravel and stones of other kinds, which are used for practically the same or similar purposes, where the former as well as the latter can be extracted, removed and marketed at a profit. The rule in *Zimmerman v. Brunson* will therefore no longer be followed but is overruled.”

loc. cit., at p. 721.

We have thus quoted at length from the *Layman* case because it represents the guiding precedent from which the Federal Government has never since departed. In this holding the Land Department reconciled its rule with that of the courts, whose decisions it cites with approval, by referring to the cases of *Northern Pacific Railway Co. v. Soderberg*, (1903), 188 U.S. 526, 534, and *Loney v. Scott*, (Ore. 1910), 112 P. 172.* In the *Soderberg* case, (*supra*), it was held that the overwhelming weight of authority was to the effect that mineral lands include not merely metalliferous minerals, but “all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture.” In *Loney v. Scott*, (*supra*), the Supreme Court of Oregon held that building sand worth 50 cents per cubic yard, and marketable in large quantities, as shown by the Director of the Geological Survey in his reports of mineral resources, was mineral land and subject to location under the

*Also, *Webb v. American Asphaltum Co.*, (1907), 157 Fed. 203.

placer mining laws and that a patent issued to a railroad company under its place land grant carried no title to such deposits then known to be embraced in a placer mining claim.

As was alluded to above, the universal rule thus reestablished in *Layman v. Ellis*, (*supra*), has since been consistently followed by the Land Department without further exceptions.

See: Opinion of Acting Solicitor Fahy, approved by the Asst. Secretary of the Interior, 54 L.D. 294.

United States v. Barngrover (1954) 57 L.D. 533.

In the case last cited the Department stated its present rule as follows:

“Consequently under the rule in the *Layman* case and also under court decisions, it appears that any substance found in nature, having a sufficient value separate from its situs as part of the earth, to be mined, quarried or dug for its own sake or its own specific uses is locatable and enterable under the mining laws.”

loc. cit., at p. 534.

The learned Trial Judge in his opinion (R. 36) attempted to dispose of *Layman v. Ellis*, (*supra*), by first stating that it was “perhaps” influenced by *Loney v. Scott*, (*supra*), and then essayed to discredit the latter case by stating that “it may perhaps be accounted for by the fact that that Court at Page 175 mistook a statement of the theory of one of the

parties in *Northern Pacific Ry. Co. v. Soderberg*, at 188 U.S. 534, for the opinion of the Supreme Court.” However, a careful reading of the reported opinions in both these cited cases fails to substantiate this statement on the part of the Court below. Thus, in *Loney v. Scott*, (*supra*), the Supreme Court of Oregon, in an opinion by Judge Eakin, states as follows:

“The question arises whether building sand is a mineral, within the mineral laws of the United States. * * * In *Northern Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 534 * * * the Court, in discussing whether granite comes within the term, ‘mineral deposit’ say: ‘The words, “valuable mineral deposit” * * * should be construed as including all land chiefly valuable for other than agricultural purposes and particularly as including non-metallic substances [naming a list, and continuing]. We do not deem it necessary to attempt an exact definition of the words “mineral lands” as used in the Act of July 2, 1864 * * *. With our present light upon the subject it might be difficult to do so. * * * Indeed, we are of the opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include, not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture.’ ”

The Oregon court concludes that: “This definition seems broad enough to include building sand, and we are of the opinion that land more valuable for the building sand it contains than for agriculture is sub-

ject to placer location, and is mineral within the meaning of the United States mining statute.”

loc. cit., at p. 175.

Turning next to the reported decision in the case of *Northern Pacific Railway Co. v. Soderberg*, (*supra*), we find in Volume 188 of the United States Reports, at page 528, the commencement of an opinion by Mr. Justice Brown, which continues through page 537 of the volume referred to. On page 534 we find the following language, which unquestionably appears to be the language used by the Court in its opinion and forms the basis of its decision, and is clearly not (as the learned Trial Judge seems to assume for reasons which are not readily apparent) merely “a statement of the theory of one of the parties” (R. 36):

“The rulings of the Land Department, to which we are to look for the contemporaneous construction of these statutes, have been subject to very little fluctuation, and almost uniformly, particularly of late years, have lent strong support to the theory of the patentee, that the words ‘valuable minerals deposit’ should be construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including non-metallic substances, among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, petroleum, limestone, building stone and coal. The cases are far too numerous for citation, and there is practically no conflict in them.

The decisions of the state courts have also favored the same interpretation. * * * The rulings of the English courts have, with a possible exception in some earlier cases, adopted the construction that valuable stone passed under the definition of minerals. * * *

We do not deem it necessary to attempt an exact definition of the words 'mineral lands' as used in the Act of July 2, 1864. With our present light upon the subject it might be difficult to do so. It is sufficient to say that we see nothing in that act or in the legislation of Congress up to the time this road was definitely located [1884], which can be construed as putting a different definition upon these words from that generally accepted by the text writers upon the subject. Indeed we are of the opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture."

loc. cit., at pp. 534-537.

The foregoing statement, with its passing reference to the theory of the patentee, *which it approves and adopts*, certainly lends full support to the assumption of the Oregon Court that the highest court of the United States has given its sanction to a broader definition of the term "mineral" than was contended for by the appellants in *Loney v. Scott*, (*supra*), and therefore the deprecatory characterization of these

well reasoned precedents by the learned Trial Judge in his opinion (R. 36) appears to be unwarranted.

At the present time American judicial decisions, administrative determinations, and the view of the leading text writers are in harmony with respect to the uniform holding that sand and gravel are considered "minerals" within the meaning of the mining laws of the United States. Insofar as the Land Department is concerned, this position has been followed without deviation since the *Layman* case was decided over a quarter of a century ago. Obviously, if Congress had disagreed with this administrative determination, it could and would have enacted corrective legislation. This view is supported by the fact that in another instance, when the Land Office decided that building stone was too common to be classified as a mineral, Congress promptly enacted the statute set forth in 30 U.S.C.A., Section 161, which expressly extends the general placer mining laws to building stone, thus reversing the position of the executive department. Moreover, Congress has thus indicated a consistent policy of extending the mining laws to commercially valuable deposits of materials which not necessarily fit into the narrow definition of "minerals" given to them by some of the older text writers and decisions. At the same time, Congress has acquiesced for over 25 years in an administrative policy including within the terminology of the mining laws sand and gravel, the substances with which we are here concerned.

Finally, and we believe conclusively, this contemporaneous construction of the mining laws by the Land Department to which the courts were exhorted to look by the Supreme Court of the United States in the *Soderberg* case (*loc. cit.*, at p. 534), has been specifically reaffirmed by an enactment *in pari materia*, contained in the Federal statute known as the Act of July 31, 1947, 61 Stat. 681, 43 U.S.C.A., Secs. 1185, *et seq.*, commonly referred to as the "Materials Act". By this enactment the legislative branch of the United States Government specifically authorized the disposal of certain enumerated materials, including sand and gravel, where such disposal of these materials is "not otherwise expressly authorized by law, including the United States mining laws."

The learned Trial Judge in his opinion indeed makes reference to this statute (R. 37) but discovers therein support for the view that sand and gravel were not contemplated by the Congress as constituting minerals. In reaching its conclusion, the Court below reasoned as follows: "(By the Materials Act) Congress authorized the disposition of sand, gravel, stone and clay from the public lands. Since this act bears a close analogy to the mineral lands leasing act [Act of February 25, 1920, 41 Stat. 437], it would appear to follow that sand and gravel, like the minerals specified in the latter act, were not intended to be disposed of under the mining laws." This reasoning appears quite plausible at first blush, but is completely rebutted by the express language of the Materials Act itself, which as has been shown, pro-

vides for the disposal of these materials only to the extent not otherwise expressly authorized by law, *including the United States mining laws*. It is further refuted by the legislative history of the Materials Act, which is appended to this brief. Particularly significant are the following quotations gleaned from the reports of the Congressional committees concerned with this legislation as well as from the recommendations of the Department of the Interior:

“Explanation of the bill. The purpose of this bill is to authorize the Secretary of the Interior to dispose of materials, including but not limited to those enumerated in the bill, for the disposal of which no present authority exists. *It supplements present disposal methods and does not conflict with them.* The disposals would be subject to three conditions:

1. The disposal of the materials must not be otherwise expressly authorized by law. *This prevents conflict with* such laws as the national forest timber laws and *the mining laws.*” (Emphasis supplied.)

See: Report of the Committee on Public Lands, House of Representatives, (80th Cong. 1st Session), No. 867*; and also Report of the Committee on Public Lands, U.S. Senate, (80th Cong. 1st Session), No. 204, concurring in the above without amendment*;

“The proposed bill would authorize the Secretary of the Interior to dispose of *sand, stone, gravel, vegetation, timber, and other materials* or re-

**Vide infra*, Appendix to Appellants’ brief.

sources on the public lands with the exception of those in national forests, national parks, national monuments, or Indian lands, *if such disposal is not otherwise expressly authorized or prohibited by law* and if he finds that such disposal would not be detrimental to the public interest. Thus, *the bill would not interfere with or impair the operation of the mining laws or of the Taylor Grazing Act * * ** Included in the materials to which it is contemplated the proposed bill would apply are: * * * 2. *Sand, stone, and gravel not of such quality and quantity as to be subject to the mining laws* but which are desired by local governments, railroads, local industries, ranchers, and farmers for the construction and maintenance of highways, secondary roads, railroads, structures of various kinds, and farm and ranch improvements.” (Emphasis supplied.)

See: Letter of transmittal, dated April 10, 1947, from Oscar L. Chapman, Undersecretary of the Interior to Honorable Arthur H. Vandenberg, President pro tempore, United States Senate*.

Thus the express language of the statute which provides for the disposal of such materials or resources if such disposal “is not otherwise expressly authorized by law, *including the United States mining laws,*” the legislative history of the bill, and the consistent contemporaneous construction of the mining laws by the Land Department, which was known to the Congress at the time of the enactment of the

**Vide infra*, Appendix to Appellants’ brief.

Materials Act all combine to lead to one inescapable conclusion. It is this: that far from intending to eliminate from the operation of the mining laws the substances known as sand and gravel, in a manner analogous to that in which the Mineral Leasing Act of February 25, 1920 eliminated coal, oil and gas, and other specifically enumerated substances, the Materials Act was designed to supplement and to confirm, the previously authorized disposal of sand and gravel under the United States mining laws, as recognized by the Land Department of the United States and by the courts.

In view of these authorities it is respectfully submitted that the pertinent conclusions of the learned Trial Judge on this issue contained in his opinion (R. 37-38) were erroneous and that sand and gravel, both prior to and—with added emphasis—since the enactment of the Materials Act, have been and are being considered by both judicial and administrative decisions as mineral substances within the purview of the mining laws of the United States.

SECOND ARGUMENT.

A. UNDER THE MINING LAWS OF THE UNITED STATES A VALUABLE DISCOVERY MAY VALIDLY BE MADE OF SAND AND GRAVEL FOUND ON THE SURFACE.

In the remainder of his opinion, the learned Trial Judge, having disposed of available precedents on the further ground that “undue weight was given to the value of gravel, as reported by the United States Geo-

logical Survey, and that the rule there enunciated may be attributed to a shift of emphasis from composition of the substance alleged to be mineral to value" (R. 36), concludes that sand and gravel are not minerals, "particularly where the location is made on land consisting almost exclusively of gravel, not only for the reasons stated by the authorities cited, but also because effect must be given to the implications of the word 'discovery' in 30 U.S.C.A. 23 and the clause 'and the lands in which they (mineral deposits) are found' in Section 22 of that title." From this he concludes that "Congress must have had in mind minerals which exist separately and differ from the surrounding matter in which they are found and from which they may be taken only by extraction and mining." The opinion, in coming to the conclusion that in the case at bar there was no valuable discovery, states that "in the traditional sense it is difficult to conceive of a discovery not attendant with great hardship, effort and expense." For this proposition, 2 Lindley on Mines, (3rd ed.), Section 437 is cited by the Trial Court.

Diligent reading of the textual section cited fails to yield any such quotation or even inference. On the other hand, the self-same section contains the following statement of the law which appears to be in direct conflict with the conclusions of the Trial Court:

"In the case of ordinary surface deposits such as the auriferous gravels, we encounter no serious difficulty in determining the sufficiency of a given discovery. The existence of the deposit is obvious,

and the only inquiry is as to its commercial value or the extent of its mineral contents as justifying the expenditure of time and money in its development and exploitation.”

loc. cit., at p. 1023.

This statement of the law is a far cry from the language found in the opinion of the learned Judge below (R. 37), who says “to say that a discovery of gravel may be made in a large area of gravel open to view is to say that there can be a discovery of water in Cook Inlet or snow on Mount McKinley. Such a perversion of the term would not only obliterate the safeguard referred to and result in the appropriation of large areas of the public domain to the detriment of the public, but it would also ignore the clause ‘and the lands in which they are found’ in Section 22 of Title 30. It is inconceivable that this was within the contemplation of Congress.”

This novel view that by “discovery” of a valuable mineral substance Congress meant the finding thereof in some hidden or unattainable place, or in a place inaccessible to man except by exploration attended with great hardship, is not supported anywhere by the language of the Act nor by the interpretations given to the term by the courts or standard authorities. Section 23 of Title 30, United States Code Annotated, referred to in the Trial Court’s opinion (R. 36)—which, incidentally, appears to be limited to lode or vein locations as distinguished from placers—states that “no location of a mining claim shall be

made until the discovery of the vein or lode within the limits of the claim located." In referring to this section, Mr. Lindley, in his well known treatise on the mining laws states:

"But this provision of the statute does not require that the locator of the claim must be the original discoverer of the vein or lode. If there has been a discovery by someone other than the locator, and the latter has knowledge of the existence of mineral and adopts the former discovery, he is entitled to make a location."

Lindley on Mines, (3rd ed.), Sec. 335, at p. 763, citing cases.

And compare once again the language of Section 437 in the same work with reference to surface deposits, which has just been quoted above.

Certainly it cannot be said, as a matter of law, that known, extensive surface deposits of mineral matter cannot be "discovered" or "rediscovered" and are thus necessarily unavailable to location under the mining law. That the appropriation of such deposits by enterprising miners might "result in the appropriation of large areas of the public domain to the detriment of the public" (R. 37), is not only debatable, but is a matter of legislative policy not to be lightly reversed by *obiter* in the opinion of a trial court called upon to decide primarily the priority of possessory rights as between conflicting claimants, in a proceeding ancillary to Land Office administration of the mining laws. Because gravel as a

mineral is widely distributed in certain parts of Alaska, and as such may be located over wide areas, does not mean, as the lower Court (perhaps facetiously?) suggests that there could be mining of "water in Cook Inlet or snow on Mount McKinley" (R. 37). There is no legal precedent holding water or snow to be minerals and until Congress so legislates or the courts so decide, the danger of appropriation of Cook Inlet or Mount McKinley by zealous prospectors may be considered fairly remote.

The language of 30 U.S.C.A. 22, quoted by the Court, which provides that "lands in which (mineral deposits) are found" shall be open to occupation and purchase, does not appear to lend such color to the Trial Court's conclusions as the opinion seems to suppose (R. 36-37). The term "lands", when given its common sense meaning, refers to a portion or parcel of the public domain which, when found to embrace within its boundaries substances recognized as minerals, may be occupied and purchased under appropriate procedures. But even accepting at face value the Trial Court's interpretation of the quoted terminology, to the effect that "Congress must have had in mind minerals which exist separately and differ from the surrounding matter in which they are found and from which they may be taken only by extraction and mining" (R. 36-37), it does not follow that extensive surface deposits are consequently excluded, or else the common technique known as "strip mining" could never have been developed. It is com-

mon knowledge that even abundant gravel deposits are underlain, at relatively shallow depth, by fundamental strata of bedrock, from which they “differ” and “exist separately”, and “from which they may be taken” by strip mining.

It must be concluded therefore, that the Trial Court erred in holding, or at least inferring, that sand and gravel cannot, as a matter of law, constitute a valuable mineral “discovery” under the mining laws. Neither can the Trial Judge’s ruling be sustained on the ground that this specific gravel deposit does not constitute the discovery of a valuable mineral deposit, a proposition which is the subject matter of the next-succeeding argument.

B. WHETHER ANY SPECIFIC DEPOSIT OF SAND AND GRAVEL CONSTITUTES SUCH A VALUABLE DISCOVERY WHICH WILL MAKE THE LANDS IN QUESTION MINERAL IN CHARACTER, SO AS TO GIVE A LOCATOR A PREFERENCE RIGHT OVER AGRICULTURAL CLAIMANTS, IS SOLELY FOR THE DETERMINATION OF THE LAND DEPARTMENT OF THE UNITED STATES AND NOT FOR THE COURT IN THE TYPE OF PROCEEDING HERE INVOLVED.

If any principle of the mining laws has been universally and definitively established, it is that the determination of the mineral character of the land is solely for the determination of the Land Department of the United States and not for the courts.

It has been consistently held for many years that the decision as to the mineral or non-mineral char-

acter of land is for the Land Department and not for the courts:

In the case of *Burfenning v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.* (1896), 163 U.S. 321, 323, it is stated:

“It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be reexamined. *Johnson v. Towsley*, 13 Wall. 72; *Smelting Company v. Kemp*, 104 U.S. 636; *Steel v. Smelting Company*, 106 U.S. 447; *Wright v. Roseberry*, 121 U.S. 488; *Heath v. Wallace*, 138 U.S. 573; *McCormick v. Hayes*, 159 U.S. 332.”

In the case of *Cosmos Exploration Company v. Gray Eagle Oil Company*, (1903), 190 U.S. 301, it was held that the Land Department has the statutory right to make rules and regulations, and that the Courts will take judicial knowledge of such rules and regulations as shall be made by it regarding the

sale or exchange of public lands. It was further held at page 314:

“What may be the decision of the Land Department upon these questions in this case, cannot be known, but until the various questions of law and fact have been determined by that Department in favor of complainant it cannot be said that it has a complete equitable title to the land selected. * * * The Government has provided a special tribunal for the decision of such a question arising out of the administration of public land laws, and that jurisdiction cannot be taken away from it by the Courts. *U. S. v. Schurz*, 102 U.S. 378, 395.”

To the effect that decisions of the Land Department on the question of the character of public lands are conclusive on the Courts, see *Johnson v. Morris*, (Cal., 1896), 72 F. 890, 897, 898, 19 C.C.A. 229; *Heckman v. Mumford*, (1911), 4 Alaska 299; *Potter v. Randolph*, (1899), 58 P. 1905, 126 Cal. 458; *Jameson v. James*, (Cal. 1909), 100 P. 700, 155 Cal. 275; *Van Ness v. Rooney*, (1911), 116 P. 392, 160 Cal. 131, writ of error dismissed (1913) 34 S.Ct. 316, 231 U.S. 737, 58 L. Ed. 460; *LeFevre v. Amonsens*, (1905), 81 P. 71, 11 Idaho 45; *Earl v. Morrison*, (Nev. 1915), 154 P. 75; *Johnson v. Bridal Veil Lumbering Co.*, (1893), 24 Or. 182, 33 P. 528; *Ferry v. Street*, (1886), 4 Utah 521, 11 P. 571, appeal dismissed (1886) 7 S.Ct. 231, 119 U.S. 385, 30 L.Ed. 439; *Gauthier v. Morrison*, (1911), 114 P. 501, 62 Wash. 572, reversed on other grounds (1914) 34 S.Ct. 384, 232 U.S. 452, 58 L.Ed.

680. See also: *Behrends v. Goldsteen*, (1902), 1 Alaska 518 and *Sheldon v. Seatter*, (1910), 4 Alaska 95.

While matters affecting the disposition of public lands are undetermined in the land office, the Courts have no jurisdiction thereof. *Johnson v. Towsley*, (Neb. 1871), 13 Wall. 72, 82, 20 L.Ed. 485; *McDaid v. Oklahoma*, (Okla. 1893), 14 S.Ct. 59, 62, 150 U.S. 209, 37 L.Ed. 1055; *Kirwan v. Murphy*, (1903), 23 S.Ct. 599, 603, 189 U.S. 35, 47 L.Ed. 698 (reversing (Minn. 1901) 109 F. 354, 48 C.C.A. 399); *Bockfinger v. Foster*, (Okl. 1903), 23 S.Ct. 836, 840, 190 U.S. 116, 47 L.Ed. 975; *Oregon v. Hitchcock*, (Or. 1906), 26 S. Ct. 568, 570, 202 U.S. 60, 50 L.Ed. 935; *Allen v. Pedro*, (1902), 68 P. 99, 136 Cal. 1; *LeFevre v. Amonsens*, (1905), 81 P. 71, 11 Idaho 45; *Copley v. Dinkgrove*, (1873), 25 La. Ann. 577; *Marks v. Martin*, (1875), 27 La. Ann. 527, affirmed (1877) 97 U.S. 345, 24 L.Ed. 940; *Hall and Legan Lumber Co. v. Jeter*, (La. 1910), 53 So. 533; *St. Paul, M. & M. Ry. Co. v. Olson*, (1902), 91 N.W. 294, 87 Minn. 117; 94 Am. St. 693; *Commager v. Dicks*, (1892), 1 Okl. 82, 28 P. 864; *Proctor v. Stuart*, (1896), 46 P. 501, 4 Okl. 679; *Wilbourne v. Baldwin*, (1897), 47 P. 1045, 5 Okl. 265; *Fitzgerald v. Keith*, (1897), 48 P. 110, 5 Okl. 260; *Hammer v. Hermann*, (1901), 65 P. 943, 11 Okl. 127; *Hebeisen v. Hatchell*, (1902), 69 P. 888, 12 Okl. 29; *Best v. Frazier*, (1906), 85 P. 1119, 16 Okl. 523; *Pin v. Morris*, (1856), 1 Or. 230; *Moore v. Fields*, (1860), 1 Or. 317; *Empey v. Plugert*, (1885), 64 Wis. 603, 25 N.W. 560.

“* * * that the courts have no jurisdiction to determine questions of fact with reference to the public lands while the claims of the respective parties are pending before the Land Department is axiomatic * * * When, therefore, the jurisdiction of the Land Department is once set in motion, and that tribunal is engaged in the investigation which necessarily involves a determination of the character of the land, and which determination would be conclusive, the courts are precluded from trying or determining the question.”

Lindley, Mines, Vol. 1, Section 108, page 188-9.

Thus, Congress has in effect designated the Land Department as a “legislative” court:

“* * * the Congress, in exercising the powers confided to it, may establish ‘legislative’ courts (as distinguished from ‘constitutional courts in which the judicial power conferred by the constitution can be deposited’) which are to form a part of the government of the territories or of the District of Columbia, or to serve as special tribunals ‘to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it’. But ‘the mode of determining matters of this class is completely within Congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals * * *’ Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the Congressional power as to interstate and foreign

commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.”

Crowell v. Benson, 285 U.S. 22, 50.

This does not leave the Territory of Alaska without a tribunal in which it can be heard. 43 C.F.R. Section 221.1 permits contests or protests to be initiated by any person claiming an interest in the land; Sections 185.89 to 185.92 provide the procedures for protests and contests; 30 U.S.C.A. Section 40 provides the manner of taking testimony and proofs relating to contests as to the mineral or agricultural character of land.

While there is no doubt that in a proceeding under the provisions of 30 U.S.C.A. 30, the court has authority to determine whether the land may be located, *as a matter of law*, under the provisions of the mining statutes in those cases where a basic legal issue exists, nevertheless it is equally clear that in the absence of some fatal legal obstacle the determination of the questions of fact which underlie the validity and patentability of a mining location, are *exclusively* for the land office of the Department of the Interior.

Insofar as the proceedings in the Court below are concerned, their purpose is merely to adjust and settle the conflicting possessory claims of all parties concerned before a patent issues.

Enterprise Min. Co. v. Rico-Aspen (C.C.A., Colo., 1895), 66 F. 200, affirmed (1897) 167 U.S. 108, 17 S.Ct. 762, 42 L.Ed. 96.

Other than that, the jurisdiction of the Land Office is and remains exclusive and any questions between the party entitled to priority of claim and the Government, pertaining to the merits of the location, are left to the determination of that agency.

Burke v. Bunker Hill Min. Co., (C.C.A., Ida., 1891), 46 F. 644, 647;

Warnekros v. Cowan, (Ariz., 1910), 108 P. 238.

It follows that the Trial Court's speculations with respect to the supposed value or lack thereof of the mineral discovery which is the subject matter of this action were beyond the scope of the statutory authority conferred upon it in this type of proceeding and should be disregarded.

THIRD ARGUMENT.

SCHOOL LANDS IN ALASKA WERE SUBJECT TO DISPOSITION UNDER THE MINING LAWS OF THE UNITED STATES DURING 1950, THE TIME OF THE LOCATIONS IN QUESTION.

The Act of March 4, 1915, c. 181, Section 1, 38 Stat. 1214, 48 U.S.C.A. Section 353, reserved Sections 16 and 36 in each township in Alaska, not known to be mineral in character at the time of survey, from sale or settlement for the support of common schools in the Territory of Alaska, and gave the Territory the right to lease such sections.

The Act of August 7, 1939, c. 516, 53 Stat. 1243, revised the 1915 Act as follows:

“Be it enacted by the Senate and House of Representatives of the United States of America in

Congress assembled, that the Act of Congress approved March 4, 1915 (38 Stat. L. 1214-1215), being an Act to reserve lands of the Territory of Alaska for educational uses, and for other purposes, be, and the same is hereby, amended by adding to the first section of the Act the following: 'Timber on the reserved lands may be sold by the Secretary of the Interior under the provisions of Section 11 of the Act of Congress approved May 14, 1898 (30 Stat. 409-414), and such lands and the minerals therein shall be subject to disposition under the mining and mineral leasing laws of the United States, upon conditions providing for compensation to any territorial lessee for any resulting damages to crops or improvements on such lands, but the entire proceeds or income derived by the United States from such sale of timber and disposition of the lands or the minerals therein are hereby appropriated and set apart as permanent funds in the Territorial Treasury, to be invested and the income expended for the same purposes and in the manner hereinbefore provided for. Any leases issued by the Territory after a valid appropriation of such reserved lands under the mining laws or the mineral leasing laws of the United States shall be with due regard to the rights of the mineral claimant.

The Secretary of the Interior is hereby authorized to make all necessary rules and regulations in harmony with the provisions and purposes of this Act for the purpose of carrying the same into effect.' "

Appellants located their placer mining claims during 1950.

The Act of March 5, 1952, c. 80, Sections 1-3, 66 Stat., 14, repealed the 1939 Act as follows:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. That the Act of August 7, 1939 (53 Stat. 1243; 48 U.S.C. Sec. 353) be, and is hereby, repealed.

Sec. 2. Section 1 of the Act of March 4, 1915 (38 Stat. 1214, 1215) as amended (48 U.S.C. 1946 edition, Sec. 353), is hereby amended by striking out the following language in the last proviso of that section; ‘if any of the said sections, or any part thereof, shall be of known mineral character at the date of acceptance of survey thereof, the reservation herein made shall not be effective or applicable, but the entire proceeds or income derived by the United States from such sections sixteen and thirty-six (16 & 36) and such section thirty-three (33) in each township in the Tanana Valley area hereinbefore described, and the minerals therein, together with’.

Sec. 3. Section 1 of the Act of March 4, 1915 (38 Stat. 1214-1215) as amended (48 U.S.C. 1946 edition, sec. 353) is further amended by adding the following language at the end of the section: ‘Nothing in this Act shall affect any lands included within the limits of existing reservations of or by the United States, or lands subject to or included in any valid application, claim, or right initiated or held under any laws of the

United States unless and until such reservation, application, claim or right is extinguished, relinquished or cancelled.' ”

After the enactment of the 1952 Act, Appellants Schubert *et al.*, applied for patent to their placer mining claims under the saving clause of the 1952 Act; Superior Sand and Gravel Mining Co., Inc., Appellant, and Anchorage Sand and Gravel Company, Inc., filed adverse claims in the Land Office and commenced these proceedings as required by 30 U.S.C.A. Sec. 30 and 48 U.S.C.A. Sec. 386, to determine their rights as adverse mineral claimants.

As a matter of first impression, it would appear that the 1939 Act gave prospectors the right to go upon school lands to prospect for minerals and to locate and patent their claims; and that the 1952 Act took away that right but preserved existing equities. The first impression is substantiated by a review of existing law.

The problems of whether school sections are available for mining locations is not a new problem although the wording of the statute may vary slightly in each individual case. The various grants to the states and territories of Sections 16 and 36 for school purposes generally excepted lands mineral in character. However, even when the granting statute was silent on the subject, the Supreme Court has repeatedly held that the grant must be used in the light of the mining laws, the school land indemnity law, and the settled public policy respecting mineral lands

and not as though the granting constituted the sole evidence of the legislative will, and the basis of such reasoning has held that mineralized school sections were impliedly excluded from the grant. California and Utah are two states where the granting statute was silent. In each state, the Supreme Court has held that the grant did not include mineral lands, even though the state, or its successor in interest, had dealt with the lands as its own for many years.

Mining Co. v. Consolidated Mining Co., 102 U.S. 167 (regarding California); *Werk, Secretary of the Interior v. Braffett*, 276 U.S. 560 (regarding Utah); *United States v. Sweet*, 245 U.S. 563 (regarding Utah); *Dunbar Lime Co. v. Utah-Idaho Sugar Co.*, 17 Fed. (2d) 351 (regarding Utah).

In the case now before the Court, the 1915 Act is not a grant to a State of school lands but merely a reservation for the benefit of the schools of the Territory. The Territory has no right of possession for its own purposes, but may act as the agent of the United States for leasing purposes. The United States reserves the right to sell materials on the school sections, as will appear from a reading of that Act and the rules and regulations of the Bureau of Land Management, Department of the Interior, contained in Title 43 of the Code of Federal Regulations, and particularly Part 259 thereof. This was actually done in this case when sand and gravel was sold by the Government to one of the parties to this litigation. (R. 4.)

Therefore, the position of the Territory of Alaska is not nearly as strong fundamentally as the position of California and Utah after they became states, and in both those states school sections were held to be available for mining locations. Appellants believe that the school sections in Alaska were open to mining locations under the settled policies of the Government even without the enactment of the 1939 Act.

It is interesting to note that the mining claims in question in this case caused the enactment of the 1952 Act, as is shown by the legislative history of the Act as contained in Volume 2 of the United States Code and Administrative News for the 82nd Congress—Second Session, 1952, at pages 1341-4.*

A careful reading of the legislative history of the 1952 Act shows conclusively that the Governor of the Territory of Alaska, the Secretary of the Interior, and the members of both the Senate and House committees, recognized the validity of placer mining claims for sand and gravel in general under the 1939 Act and specifically recognized that the claims of Appellants herein were valid placer mining claims of commercially valuable deposits of sand and gravel.

The Trial Court in its opinion (R. 32), makes brief reference to the contention of the Territory of Alaska that these placer locations were invalid because of the existence of prior surface leases to third parties. The language of the enabling act quoted above makes it

**Vide infra*, Appendix.

clear that Congress contemplated the contemporaneous existence of mining claims and surface leases without regard to their respective priority and intended that lessees should not be able to defeat the fruition of such mining claims, subject only to the right to compensation for any resulting damages to crops or improvements. There are no allegations in this case that because of the absence of indemnification arrangements to Territorial lessees these mining claims are invalidated, but if that inference should arise, reference is here made to the only adjudicated case dealing with this precise issue. The highest Court of the State of Wyoming held in the case of *Scoggin v. Miller* (1948), 189 P. 2d 677, that the alleged fact that locators of placer mining claims had not settled with owners of surface rights as to damages or given bond to protect their interests, did not invalidate the locations in so far as proceedings on adverse claims were concerned. Moreover, it was held in this case that where both plaintiff and defendant claimed title to the mining claims from a common source, the United States, under the general mining laws, the only question before the Court was who had the better title and consequent right of possession.

There is nothing in the Trial Court's opinion, however, to indicate that it took a contrary view and it appears that it considered decision of this point unnecessary in view of the conclusion it reached on the issues previously discussed.

V. CONCLUSION.

In considering the correctness of the lower Court's decision in this case, the Appellants contend that first consideration must be given to the scope of the proceedings from which this appeal arises.

Clearly, we are dealing here with a unique statutory adverse proceeding, based upon specific authority conferred by Congress upon the Courts for the purpose of assisting the executive branch of the United States Government in its quasi-judicial functions involving the adjudication of mining claims and the disposal of mineral lands under the mining laws. Congress recognized that in the course of adjudicating applications for mining patents the Land Department would be frequently confronted with conflicting or overlapping claims to possessory rights in mineral lands and intended to preserve to claimants resort to the Courts of the land with their traditional methods of adjudication of such competing interests. The authorities are unanimous that in doing so, Congress did not intend to remove from the Land Department, or limit in any way, its exclusive jurisdiction over the determination and classification of mineral lands and the processes involved in the issuance of mining patents. In such an ancillary proceeding the Court's inquiry is therefore strictly limited to the question of priority, although as a result of the basic doctrine that courts will not rule on hypothetical or futile issues the Trial Court necessarily inquires into any fatal legal defects in the claims of the parties to the litigation.

The Court below did therefore address itself correctly to the issue of whether sand and gravel are minerals, *as a matter of law*, within the meaning of the general mining statutes enacted by the Congress of the United States. Appellants contend, however, that the Trial Court's conclusions on this point, are erroneous in that they disregard, unjustifiably, the virtually unanimous agreement of the courts, the executive departments, and the standard authorities. In so far as the decision here appealed from appears to be based on the learned Judge's conceptions of what public policy ought to be (R. 37), suffice it to say that the legislative branch of the government apparently thought otherwise and that in it is reposed the constitutional power to make or change such policies.

In so far as the Trial Court's conclusions are sought to be buttressed by reference to the Materials Act, the above discussion of the legislative history of that statute seems to indicate quite conclusively an opposite legislative intent from that deduced by the lower court in this case. Moreover, even in the absence of legislative history, both an examination of the explicit language of the Materials Act and the application of elementary principles of statutory construction compel a result contrary to that reached by the Court below. For example, the opinion of the court below would in effect repeal the provisions of 30 U.S.C.A. Section 161, extending the general placer mining laws to building stone. Implied repeals are not favored and will not be adopted unless there are overriding

considerations which inescapably compel such a result. The Materials Act, moreover, refers only to the disposal of certain substances and not to the purchase of the lands containing them, while the mining laws contemplate the occupation and purchase of the lands themselves, incident to the right to extract the minerals. The term "mineral" in the general mining laws has been interpreted to mean a variety of items; the word "materials" in the Materials Act would cover an even greater variety, as is evidenced by the specific inclusion of four items of vegetation (yucca, manzanita, mesquite, and cactus). To hold that the Materials Act provides an exclusive procedure could well mean the repeal of all prior mining laws, including the Mineral Lands Leasing Act, for all minerals are materials, but materials are not necessarily minerals. There is no point of compromise; either the Materials Act supersedes the mining laws or it supplements them; there is no criterion in the Act for determining that it supersedes the mining laws as to some items (for instance stone which is specifically mentioned) but not as to others.

Further, the Materials Act alone cannot be considered as constituting the sole evidence of the legislative will, but must be read in connection with the mining laws, the Mineral Lands Leasing Act, the Building Stone Act, and all other relevant provisions of the statutes, and the settled public policy respecting mineral lands. On such a basis, it could not be considered that Congress or the Department of the

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Interior intended that the Materials Act should supersede the mining laws. If Congress had so intended, it would not have been necessary in 1952 to repeal the 1939 Act permitting mining locations on Alaska school lands—keeping in mind that the mining claims of Appellants were the moving cause of the 1952 Act and that the legislative history of the 1952 Act recognizes the validity of the mining locations of Appellants.

It is of special note that the operation of the Materials Act is permissive and therefore cannot be construed as being conclusive. Foremost of all, the Materials Act, by its express terms, shows that it was intended as legislation *supplemental to the general mining laws* rather than in conflict with them and not for the purpose of repeal thereof. It was designed mainly to cover those marginal deposits of the substances or materials mentioned in the Act which, while of insufficient quality and quantity to satisfy the requirements of the mining laws, might still be of some utility, locally or under special circumstances, and whose disposal, apart from the land, could not otherwise be accomplished under existing legislation. It would seem to pervert completely the clear intent of this legislation to place it on a par with the Mineral Leasing Act (*supra*), and to claim that it was intended to derogate from the force of the mining laws, when by its express terms, it clearly negates any such inference.

Last, but not least, it should be borne in mind that the Territory of Alaska apparently attempted, by its

Motion to Dismiss, to do *indirectly* that which it could not do directly. It must have been clear to the representatives of the Territory that it would not be possible to induce the Land Department to overrule its holding of many years standing, to the effect that sand and gravel *are* minerals within the purview of the mining laws. This finding was made by the Department as a *general rule*, to apply to *all* the public lands throughout the United States, its Territories and possessions, and the Department undoubtedly would not upset such a ruling merely because the public interest concerned with the schools of the Territory of Alaska might be better served in this one instance by a different result, particularly when it is considered that Congress, in enacting the enabling statute, quoted above, must have intended to make this particular local public interest subservient to the greater national interest involved in the development generally of mineral resources in the Territory of Alaska.

Under these circumstances the decision of a local Trial Court, perhaps overly impressed with local problems and local policy considerations, should not be allowed to stand. This is most certainly the exact situation which Congress meant to prevent when it clothed the Land Department with nationwide, exclusive, authority to decide the character of public lands under generally applicable rules and regulations.

A decision by this Court as to the character of the land would invalidate the entire procedural safe-

guards established by the Land Department for the determination of this question. It would, in effect, repeal the regulatory and rule making powers of the Land Department as to public lands and throw every protest or contest, as well as adverse claims, into the courts.

The mineral claimants, being all parties other than the Territory, must have a decision on the status of their respective possessory rights as between themselves before they can return to the Land Office and complete the necessary steps to perfect their claims and secure patents, if they are entitled to patents. Affirmance by this Court of the Order of the Trial Court would forever bar them from such further proceedings. However, the reversal by this Court of the Order of the Trial Court would in no wise bar the Territory from contesting or protesting the mineral character of the land or even the right of the mineral claimants to locate mineral claims of any description on the lands involved; the Territory can do so before the Land Department at any time prior to the issuance of patent (43 CFR 185.89).

For the foregoing reasons and upon the authorities cited above, the Appellants herein earnestly urge this Honorable Court that the decision of the Trial Court dismissing the Complaints herein should be reversed and that the cause should be remanded for further proceedings, to determine the priority of possessory rights as between the respective parties, subject to the ultimate adjudication and issuance of patent by the

Land Office of the United States Department of the Interior.

Dated, Anchorage, Alaska,
June 18, 1954.

Respectfully submitted,

E. L. ARNELL,

VERNE O. MARTIN,

Attorneys for Appellants,

*Northern Construction Association
and Ellsworth E. Saxton, Agent.*

(Appendix Follows.)



Appendix.

Appendix

LEGISLATIVE HISTORY.

Act of March 5, 1952, c. 80, Sections 1-3, 66 Stat. 14.
Alaska—Public Lands—Reservations for
Educational Purposes.

See Legislative History, Page 1341.

Chapter 80—Public Law 270 (H. R. 3100).

An Act to Repeal the Act of August 7, 1939 (53 Stat. 1243; 48 U. S. C., Section 353).

Be it Enacted by the Senate and House of Representatives of the United States of America in Congress as assembled that:

The Act of August 7, 1939 (53 Stat. 1243; 48 U.S.C., Sec. 353) be, and is hereby repealed.

Sec. 2. Section 1 of the Act of March 4, 1915 (38 Stat. 1214, 1215), as amended (48 U.S.C., 1946 edition, sec. 353), is hereby amended by striking out the following language in the last proviso of that section: "if any of said sections, or any part thereof, shall be of known mineral character at the date of the acceptance of the survey thereof, the reservations herein made shall not be effective or applicable but the entire proceeds or income derived by the United States from such sections sixteen and thirty-six and such section thirty-three in each township in the Tanana Valley area, hereinbefore described, and the minerals therein, together with."

Section 3. Section 1 of the Act of March 4, 1915 (38 Stat. 1214, 1215), as amended (48 U. S. C., 1946 edition, section 353) is further amended by adding the following language at the end of the section:

“Nothing in this Act shall affect any lands included within the limits of existing reservations of or by the United States, or lands subject to or included in any valid application, claim, or rights initiated or held under any laws of the United States, unless and until such reservations, application, claim, or right is extinguished, relinquished, or cancelled.”

Approved March 5, 1952.

Alaska—Public Lands—Reservations for Educational Purposes.

Senate Report No. 1170, Feb. 14, 1952 (To Accompany H. R. 3100);

House Report No. 559, June 13, 1951 (To Accompany H. R. 3100);

The Senate Report repeats in substance the House Report.

Senate Report No. 1170.

The Senate Committee on Interior and Insular Affairs to whom was referred the bill, H. R. 3100, to repeal the act of August 7, 1939 (53 Stat. 1243; 48 U. S. C., sec. 353), having considered the same report favorable thereon without amendment and with the recommendation that the bill to pass.

The Committee heard representatives of the Interior Department and Governor Gruening of Alaska, who

appeared in behalf of the bill. They were unanimous in support of the measure.

The reasons for early action were set forth by Governor Gruening in a letter to the Chairman of the Committee as follows:

I will mention Delegate Bartlett's H. R. 3100 designed to repeal the Act of August 7, 1939 (53 Stat. 1243; 48 U. S. C. A., 353, pocket supplement) whereby reserved school sections were made subject to disposition under the mining law. Some months ago this provision was shown to be extremely costly to Alaska's permanent school fund when private parties staked the most valuable school section in Alaska, basing their mineral claims on their alleged discoveries of gravel. Actually the United States had used the gravel for some years and had noted its presence in original survey filed notes.

At the moment of staking, negotiations were under way in the Land Office for issues of a permit to a private contractor for extraction of gravel from this very section. From that permit alone the school fund would have realized over \$13,000 on a yardage royalty basis, by virtue of legislation enacted by Congress last year (Public Law 744, August 31, 1950). Estimates of the section's value, based upon its gravel content have run as high as \$2 million. An extreme shortage of gravel in the area places a premium value on the section and assures a market for its gravel. Moreover, its location on the outskirts of Anchorage, Alaska's major population center, has made the sec-

tion the greatest income producer, through occupancy under lease, of all school sections in Alaska.

The loss of this section under the 1939 Act now sought to be repealed by House R. 3100 is indicative of what may happen to any school section in Alaska. Indeed the example set by the stakers has already been followed by others, on other school sections, and every day's delay in forestalling such staking further endangers the school fund. H. R. 3100 has already passed the House, so early action in the Senate will be immediately beneficial. Accordingly it is imperative that H. R. 3100 be enacted before the permanent school fund suffers irreparable and permanent loss.

* * * * *

The House Committee adopted the recommendation of the Interior Department and the Senate Committee concurred in the report submitted by the House Committee which read as follows:

EXPLANATION OF THE BILL.

The Act of March 4, 1915 (38 Stat. 1214, 1215, 48 U. S. C., sec. 353) established a school reserve for the Territory of Alaska, consisting of certain sections of land in each township. The 1915 Act authorized the school reserve lands to be leased by the Territory. The 1915 Act was interpreted, however, as not authorizing the sale of timber or the extraction of minerals. Therefore, the 1939 Act was passed to allow the disposal of such timber and minerals, the proceeds of which were to go to the Territorial school fund. Recently mining

locations for gravel were made on a school reserve section near Anchorage. It was then realized that instead of the Territorial school fund getting the benefit of the value of this section it would all accrue to the locator of the mining claim, except for the small amount realized if he were to apply for a mining patent.

While the repeal of the 1939 Act would prevent the location of mining claims and the depletion of the Territorial school fund at the same time it would not, because of other existing law, prevent the utilization of the timber and other resources of the land for the benefit of the Territorial Schools. The Materials Act of July 31, 1947 (43 U.S.C., sec. 1185 et seq.) provides for the disposal of timber, sand, stone and gravel, and other materials reserved from the public domain. By the Act of August 31, 1940 (public law 744, 81st Cong., 64 Stat. 571), the proceeds received from the disposition of materials from school section lands in Alaska are set apart as separate and permanent funds in the Territorial Treasury, as provided for other income derived from such lands under the 1915 Act.

The amendments adopted by the Committee would eliminate from the Act of March 4, 1915, *supra*, the exception which excludes from the reserve lands of known mineral character. This is in line with the more general provisions applicable to the school land grants to the States, since the enactment of the Act of Jan. 25, 1927 (44 Stat. 226), as amended (43

U. S. C., sec. 817, et seq.). It also would make it impossible for anyone to stake mining locations on school-reserve sections in Alaska on the ground that they were mineral in character, and therefore not part of the school reserve. The proposed Section 3 which would be added to H. R. 3100 would merely serve to exclude from the grant, as did the 1927 Act, lands subject to other reservations or valid existing rights.

The report of the Department of the Interior to the Chairman of the House Committee on Interior and Insular Affairs is hereinbelow set forth in full and made a part of this report.

* * * * *

Department of the Interior
Office of the Secretary
Washington, D. C., May 17, 1951

Hon. John R. Murdock
Chairman, Committee on Interior and Insular Affairs
House of Representatives, Washington, D. C.

My dear Mr. Murdock: This is in reply to the request of your Committee for a report on H. R. 3100, a bill to repeal the Act of August 7, 1939 (53 Stat. 1243; 48 U. S. C., sec. 353).

I recommend the enactment of this bill but suggest certain amendments.

This bill is urgently needed to protect the interest of the Territory of Alaska in the proceeds from lands reserved from sale or settlement for the benefit of Ter-

territorial School under the Act of March 4, 1915 (38 Stat. 1214, 1215, 48 U. S. C., 1946 ed., section 353). The 1915 Act reserves from disposition specified sections of public domain lands not known to be mineral in character at the time of their survey, and provides that the proceeds derived by the United States from the reserved lands are set apart as permanent funds in the Territorial Treasury, the income of which is to be expended only for the exclusive use and benefit of territorial school as the Alaska Legislature may direct.

The 1915 Act was amended, however, by the Act of August 7, 1939 (53 Stat. 1243) to subject the lands reserved under the 1915 Act to disposition under the mining and mineral leasing laws of the United States and to authorize the sale of timber on those lands, under the Act of May 14, 1898 (30 Stat. 409, 414). The purpose of the 1939 Act was "to provide authority for the sale of the timber and mineral products from such reserved sections" (H. Rept. No. 941, to accompany H. R. 3025, 76th Cong. 1st Sess. June 26, 1939). Even though the 1939 Act made possible greater utilization of the lands reserved for the Territory and therefore generally promoted the basic purposes of the 1915 Act to secure revenue for the support of the territorial schools, the 1939 Act inadvertently opened the way for complete obstruction of the purposes of these two acts by permitting disposal of title to these lands under the United States mining laws. The Territorial school fund would receive little or no income from such disposals.

Legislation such as H. R. 3100 to repeal the 1939 Act and prevent the location of mining claims on lands reserved for the benefit of Territorial schools is now urgently needed. Private individuals have recently been very active in staking mining claims on school Section lands, like those located on valuable tracts of lands on Section 16, Township 3 North, Range 3 West, Seward Meridian, near Anchorage, Alaska.

The repeal of the 1939 Act would not prevent the disposal of materials on lands reserved for the benefit of the Territorial schools, because of the Materials Act of July 13, 1947 (43 U. S. C., 1946 ed., supp. III, Sec. 1185, et seq.). Under the recent amendment of the Materials Act by the Act of August 31, 1950 (64 Stat. 571, Public Law 744, 81st Cong.) the proceeds received from the disposition of materials from school section lands in Alaska are set apart as separate and permanent funds in the Territorial Treasury as provided for other income derived from such lands under the 1915 Act.

To prevent entirely the staking of mining locations on the sections specified in the 1915 Act, because of possible doubt as to whether the lands were known to have been mineral in character at time of acceptance of the plat of survey and also to bring the provisions of the 1915 Act more nearly in line with more generous provisions applicable to the States, ever since the enactment of the Act of Jan. 25, 1927 (44 Stat. 1026), as amended (43 U. S. C., 1946 ed., sec. 870, et seq.) it is recommended that the exemption of mineral lands

from the 1915 Act be deleted. This could be accomplished by adding the following sections to H. R. 3100:

“Sec. 2. Section 1 of the Act of March 4, 1915 (38 Stat. 1214, 1215), as amended (48 U. S. C., 1946 ed., section 353) is hereby amended by striking out the following language in the last proviso of that section: “if any of said sections, or any part thereof shall be of known mineral character at the date of the acceptance of the survey thereof, the reservations herein made shall not be effective or applicable but the entire proceeds or income derived by the United States from such sections sixteen and thirty-six and such sections thirty-three in each township in the Tanana Valley area, hereinbefore described, and the minerals therein, together with.”

“Sec. 3. Section 1 of the Act of March 4, 1915 (38 Stat. 1214, 1215) as amended (48 U. S. C., 1946 edition, section 353) is further amended by adding the following language at the end of the section: “Nothing in this Act shall affect any lands included within the limits of existing reservations of or by the United States, or lands subject to or included in any valid application, claim, or rights initiated or held under any laws of the United States, unless and until such reservations, applications, claim, or right is extinguished, relinquished or cancelled.”

Since I understand that your Committee desires to hold an immediate hearing on H. R. 3100 this report has not been submitted to the Bureau of the Budget. Consequently I am unable to advise you at present

concerning the relationship of the views expressed herein to the program of the President.

Sincerely, yours,

/s/ Mastin G. White

Acting Assistant Secretary of the Interior.

Calendar No. 205

80th Congress
1st Session

SENATE

Report
No. 204

Providing for the Disposal of Materials on the
Public Lands of the United States

May 26 (legislative day, April 21), 1947.—

Ordered to be printed

Mr. Cordon, from the Committee on Public Lands, submitted the following

REPORT

[To accompany S. 1185]

The Senate Committee on Public Lands, to whom was referred the bill (S. 1185) to provide for the disposal of materials on the public lands of the United States, having considered the same, report favorably thereon without amendment and with the recommendation that the bill do pass.

The proposed legislation would authorize the Secretary of the Interior to dispose of sand, stone, gravel,

timber, and other forest products on public lands of the United States. The bill is similar to S. 2126, Seventy-ninth Congress, and is designed to place in the form of permanent legislation authority to dispose of materials on the public lands substantially similar to the temporary authorization of the act of September 27, 1944 (58 Stat. 745, 50 U.S.C. App. secs. 1601-1603). The temporary authorization expired on December 31, 1946, when the President in Proclamation No. 2714 proclaimed the cessation of hostilities in World War II.

Materials subject to the bill would be disposed of for an adequate price after ample public notice. Where the appraised value exceeds \$1,000 disposal would be made to the highest responsible qualified bidder by competitive bidding and after publication in a newspaper of general circulation in the county in which it is located. Where the appraised value is \$1,000 or less disposition would be upon such notice and in such manner as the Secretary may prescribe.

The Department of the Interior submitted and recommended a bill which is practically identical with this proposed legislation, with the exception that it provided also for the disposal of resources and vegetation. It was the view of the committee that the terms "resources" and "vegetation" were too general and should not be included in a bill of this kind, which conformed to the action of the Senate Public Lands Committee on S. 2126, in the Seventy-ninth Congress in eliminating similar provisions.

Further detailed information concerning this bill is carried in the letter of transmittal, which letter is hereinbelow set forth in full and made a part of this report.

Department of the Interior,
Washington, April 10, 1947.

Hon. Arthur H. Vandenberg,
President pro tempore, United States Senate.

My Dear Senator Vandenberg: Enclosed is a proposed bill to provide for the disposal of materials or resources on the public lands of the United States.

I respectfully request that this proposed bill be referred to the appropriate committee for consideration, and I recommend that it be enacted.

The proposed bill is similar to S. 2126 (79th Cong.). It is designed to place in the form of permanent legislation authority to dispose of materials and resources on the public lands substantially similar to the temporary authorization of the act of September 27, 1944 (58 Stat. 745, 50 U. S. C. App. secs. 1601-1603). The temporary authorization expired on December 31, 1946, when the President in Proclamation No. 2714 proclaimed the cessation of hostilities in World War II.

The proposed bill would authorize the Secretary of the Interior to dispose of sand, stone, gravel, vegetation, timber, and other materials or resources on the public lands with the exception of those in national

forests, national parks, national monuments, or Indian lands if such disposal is not otherwise expressly authorized or prohibited by law and if he finds that such disposal would not be detrimental to the public interest. Thus, the bill would not interfere with or impair the operation of the mining laws or of the Taylor Grazing Act (48 Stat. 1269, 43 U. S. C. sec. 315), as amended.

The materials and resources subject to the bill would be disposed of for an adequate price after ample public notice. Where the appraised value of the material or resource exceeds \$1,000, it would be disposed of only to the highest responsible qualified bidder by competitive bidding and after publication in a newspaper of general circulation in the county in which it is located. Where the appraised value is \$1,000 or less it would be disposed of upon such notice and in such manner as the Secretary may prescribe.

The proposed bill would extend the policy of the temporary act to public lands which have been withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior, or of a State, Territory, or local governmental unit. In such cases, the Secretary could make disposals under the bill only with the consent of such department, agency, or unit. Instances have arisen where persons have desired the natural products on such withdrawn lands and where there was no objection to the sale, but where no sale could be made because the temporary act reached only lands under the "exclusive jurisdiction" of the Secretary of the Interior.

The bill would also eliminate the \$10,000 limit on a single sale contained in the temporary legislation. It is anomalous to require competitive bidding and to have a dollar limit on sales. The estimated value of the resource offered must necessarily be considerably below \$10,000 in order to allow for the bidding process. Furthermore the bidders have no reason to bid over \$10,000, no matter what their bid would have been in a free market.

The limit has other disadvantages. For example, in the case of timber on public lands which are not suitably located for inclusion in a sustained yield, cooperative agreement under the act of March 29, 1944 (58 Stat. 132, 16 U. S. C. sec. 583), the value of timber in an area suitable for the activities of only one purchaser may be several times \$10,000. This limitation prevents the most advantageous disposal of timber in such area. In order for the Government to receive the maximum stumpage value and to obtain maximum productivity through prudent forest management, timber should be sold on the basis of natural logging units which may often contain timber worth more than \$10,000. The limitation, therefore, encourages the cutting of only the most desirable and accessible timber in such unit and the leaving of other timber which frequently should be cut to prevent its deterioration. Furthermore, a timber operator incurs certain expenses for logging roads, equipment, structures, and other improvements which must be amortized during the life of the operation. If a sufficiently large block of timber is not made available in one sale to warrant

such necessary expenditures, ordinarily no sale will be consummated. If an operator should submit a bid it would be very low because, not assured of additional supplies of timber in the same area, the entire cost of physical improvements would likely be charged against his small timber allotment. It is also significant to note that all other commercial timber under Federal administration in the United States and Alaska can be sold without a limitation of this kind.

There are on the public lands many materials and resources which can be used profitably for the benefit of local industries and communities and to the disposition of which there is no real objection. There is, however, no permanent legislation under which these may be utilized. The Congress took cognizance of this when it passed the temporary act of September 27, 1944, *supra*. Since that act has expired, there is no statutory authority to dispose of these useful materials.

Included in the materials to which it is contemplated the proposed bill would apply are:

1. Timber and other forest products which are not susceptible of management under a sustained yield program under the act of March 29, 1944, *supra*, but which may be disposed of in a manner not harmful to the public interest. Important forest products include turpentine and other derivatives of resin, medicinals, aromatics, tannin, and dyes.

2. Sand, stone, and gravel not of such quality as to be subject to the mining laws but which are desired

by local governments, railroads, local industries, ranchers, and farmers for the construction and maintenance of highways, secondary roads, railroads, structures of various kinds, and farm and ranch improvements.

3. Yucca, manzanita, mesquite, cactus and other desert and mountain vegetation which provide such products as disinfectants and medicinal compounds, soap, food, splints, rope, twine, burlap, baskets, novelties, ornaments, insecticides, and alcohol.

4. Common earth to be used for road fills, earth dams, stock-watering reservoirs, and similar uses.

5. Clay to be used for the manufacture of bricks, tile, pottery, and similar products.

Among the resources listed above, timber and forest products are by far the most important. There still remains under the jurisdiction of the Department of the Interior as scattered tracts or areas outside of existing reservations and outside of the revested Oregon and California grant lands an estimated $3\frac{1}{2}$ to 5 million acres of commercially productive public domain forest land with an estimated volume of at least 6,000,000,000 feet of merchantable saw timber, valued at 20 to 25 million dollars. Woodlands comprise a very much larger area and contribute substantially to meeting the needs of local people for poles, fence posts, fuel wood, and similar products. With the expiration of the temporary act, the Department now has no statutory authority to sell this public domain green timber other than under a sustained yield agreement under the act of March 29, 1944, *supra*.

An increasing number of applications have been received for the purchase of this public-domain timber. At this time 56 applications are on file for timber in amounts varying in value from several hundred dollars to \$50,000 or more. It may be reasonably assumed that a number of persons did not file applications because of the \$10,000 limitation or because of the temporary nature of the act.

The timber and other forest products on these lands are a renewable resource. Since timber lessens in value each year following maturity, it should be removed at the time it has its greatest value. This Department, as a long-time advocate of conservation and wise land use, is pledged to maintain these forest and woodlands in a state of good productivity. In order to secure the maximum annual growth and thereby obtain such productivity, it is necessary to remove the mature trees, to make cuttings to prevent stands from becoming stagnated, and to employ other established forest-management practices. These things cannot be accomplished without authority to sell the timber which would be cut under such management practices.

The present shortage of lumber, poles, ties, mine timbers, and other forest products is another impelling reason for disposing of merchantable timber on the public domain in a manner that will benefit the growth and yield of forest stands. Revenues to the Federal Treasury resulting from the proposed legislation would not be insignificant.

This bill would not displace present laws authorizing the disposal of public-land resources, nor would

it provide an alternative method of disposal since it would apply "only if the disposal of such materials or resources * * * is not otherwise expressly authorized by law, including the United States mining laws." National forests are specifically excluded from its operation.

The Bureau of the Budget has advised me that there is no objection to the presentation of this proposed legislation to the Congress.

Sincerely yours,

Oscar L. Chapman,

Under Secretary of the Interior.

A BILL To provide for the disposal of materials or resources on the public lands of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the Secretary of the Interior, under such rules and regulations as he may prescribe, may dispose of materials or resources, including sand, stone, gravel, vegetation, and timber or other forest products, on public lands of the United States if the disposal of such materials or resources (1) is not otherwise expressly authorized by law, including the United States mining laws, (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest. Such materials and resources may be disposed of only in accordance with the provisions of this Act and upon the payment of adequate compensation therefor, to be determined by the Secretary. Where the lands have been withdrawn in aid of a function of a Federal depart-

ment or agency other than the Department of the Interior or of a State, Territory, county, municipality, water district, or other local governmental subdivision or agency, the Secretary of the Interior may make disposals under this Act only with the consent of such Federal department or agency or of such State, Territory, or local government unit. Nothing in this Act shall be construed to apply to lands in any national forest, national park, or national monument or to any Indian lands or lands set aside or held for the use or benefit of Indians, including lands over which jurisdiction has been transferred to the Department of the Interior by Executive order for the use of Indians.

Sec. 2. Where the appraised value of the materials or resources exceeds \$1,000, it shall be disposed of by the Secretary to the highest responsible qualified bidder by competitive bidding and publication of notice of the proposed disposal in a newspaper of general circulation in the county in which the material or resource is located. Such notice shall be published for as many times and for such period as the Secretary may prescribe. Where the appraised value of the material or resource is \$1,000 or less, it may be disposed of by the Secretary upon such notice and in such manner as he may prescribe.

Sec. 3. All moneys received from the disposal of materials or resources under this Act shall be disposed of in the same manner as moneys received from the sale of public lands.

80th Congress HOUSE OF Report
1st Session REPRESENTATIVES No. 867
Providing for the Disposal of Materials on the
Public Lands of the United States

July 10, 1947.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

Mr. Welch, from the Committee on Public Lands, submitted the following

REPORT

[To accompany S. 1185]

The Committee on Public Lands to whom was referred the bill (S. 1185) to provide for the disposal of materials on the public lands of the United States, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

The amendments are as follows:

Page 1, line 5, after the word "including", insert the words "but not limited to".

Page 1, line 5, after the comma following the word "gravel", insert the words "yucca, manzanita, mesquite, cactus, common clay".

Page 2, line 2, strike out the period following the word "Secretary", and insert in lieu thereof the following:

“Provided, however, That, to the extent not otherwise authorized by law, the Secretary is authorized in his discretion to permit any Federal, State, or Territorial agency, unit, or subdivision including municipalities, or any person, or any association or corporation not organized for profit, to take and remove, without charge, materials and resources subject to this Act, for use other than for commercial or industrial purposes or resale.”

Page 2, line 20, strike out the words “at least thirty days” and insert in lieu thereof “four consecutive weeks”.

Explanation of the Bill.

The purpose of this bill is to authorize the Secretary of the Interior to dispose of materials, including but not limited to those enumerated in the bill, for the disposal of which no present authority exists. It supplements present disposal methods and does not conflict with them. The disposals would be subject to three conditions:

1. The disposal of the materials must not be otherwise expressly authorized by law. This prevents conflicts with such laws as the national forest timber laws and the mining laws.

2. The disposal must not be expressly prohibited by other laws. The bill is not intended to override previous prohibitory legislation.

3. The disposal must not be detrimental to the public interest. This sets a standard for the Secretary.

to use in exercising the authority the bill would grant to him.

The bill provides for competitive bidding when the appraised value of the material to be disposed of exceeds \$1,000. It also provides that the moneys received shall be disposed of in the same manner as moneys received from the sale of the public lands.

Similar authority of a temporary nature which had been granted to the Secretary of the Interior by the act of September 27, 1944 (58 Stat. 745; 50 U. S. C., App. sec. 1601), expired on December 31, 1946, when the President proclaimed the cessation of hostilities in World War II. That act had proven to be very useful in disposing of such materials as timber and forest products not encompassed by other laws, various types of desert and mountain vegetation, sand, stone, gravel, common earth, and clay. Both local users and the Nation as a whole benefit from the utilization of these resources. Failure to use them in many instances results merely in their being wasted.

The first two committee amendments are designed to broaden the specification of materials covered by the bill as it passed the Senate to include yucca, manzanita, mesquite, cactus, and common clay, all of which the committee believes should be within the scope of the bill. The enumeration is made illustrative rather than exclusive since it would be impossible specifically to name every material for which a valuable use may be found.

The third amendment is designed to authorize the Secretary to issue free use permits allowing Federal, State, and local governmental agencies, nonprofit organizations, and individuals to take and remove the substances covered by the bill without charge for use for noncommercial or nonindustrial purposes. This authorization is similar to that already existing for timber on public lands outside of national forests (16 U. S. C., sec. 604). It would widen the applicability of free use timber permits in Alaska where such permits may now be issued only to specified classes of individuals and to churches, hospitals, and charitable institutions for a limited number of purposes (48 U. S. C., sec. 423). The committee considers that the authorization of such free use permits would result in public benefits which would outweigh any monetary income the Government might receive for the particular materials involved.

The last amendment changing the minimum advertising from once each week for 30 days to once each week for 4 weeks would cut the cost about one-fifth and would result in the saving of considerable money, since the Government would pay for the advertising.

The lengthening time gap between the expiration of the temporary act and the enactment of this measure is causing both waste and confusion with respect to the materials involved. The committee therefore recommends that the bill be promptly enacted.

Similar legislation was introduced in both the Senate and House of Representatives in accordance with

Executive communications suggesting the same to the President pro tempore of the Senate and the Speaker of the House of Representatives. H. R. 3107 was the bill introduced in the House by Hon. Richard J. Welch, chairman of the Committee on Public Lands. S. 1185, which has already passed the Senate, has been substituted for H. R. 3107, and amended.

The Department of the Interior communication favoring this legislation is as follows, and is made a part of this report:

Department of the Interior,
Washington 25, D. C., April 10, 1947.

Hon. Joseph W. Martin, Jr.,
Speaker of the House of Representatives.

My Dear Mr. Speaker: Enclosed is a proposed bill to provide for the disposal of materials or resources on the public lands of the United States.

I respectfully request that this proposed bill be referred to the appropriate committee for consideration, and I recommend that it be enacted.

The proposed bill is similar to S. 2126 (79th Cong.). It is designated to place in the form of permanent legislation authority to dispose of materials and resources on the public lands substantially similar to the temporary authorization of the act of September 27, 1944 (58 Stat. 745; 50 U. S. C., App. secs. 1601-1603). The temporary authorization expired on December 31,

1946, when the President in Proclamation No. 2714 proclaimed the cessation of hostilities in World War II.

The proposed bill would authorize the Secretary of the Interior to dispose of sand, stone, gravel, vegetation, timber, and other materials or resources on the public lands with the exception of those in national forests, national parks, national monuments, or Indian lands, if such disposal is not otherwise expressly authorized or prohibited by law and if he finds that such disposal would not be detrimental to the public interest. Thus, the bill would not interfere with or impair the operation of the mining laws or of the Taylor Grazing Acts (48 Stat. 1269; 43 U. S. C., sec. 315), as amended.

The materials and resources subject to the bill would be disposed of for an adequate price after ample public notice. Where the appraised value of the material or resource exceeds \$1,000, it would be disposed of only to the highest responsible qualified bidder by competitive bidding and after publication in a newspaper of general circulation in the county in which it is located. Where the appraised value is \$1,000 or less, it would be disposed of upon such notice and in such manner as the Secretary may prescribe.

The proposed bill would extend the policy of the temporary act to public lands which have been withdrawn in aid of a function of a Federal department or agency other than the Department of the Interior, or of a State, Territory, or local governmental unit. In

such cases, the Secretary could make disposals under the bill only with the consent of such department, agency, or unit. Instances have arisen where persons have desired the natural products on such withdrawn lands and where there was no objection to the sale, but where no sale could be made because the temporary act reached only lands under the "exclusive jurisdiction" of the Secretary of the Interior.

The bill would also eliminate the \$10,000 limit on a single sale contained in the temporary legislation. It is anomalous to require competitive bidding and to have a dollar limit on sales. The estimated value of the resource offered must necessarily be considerably below \$10,000 in order to allow for the bidding process. Furthermore the bidders have no reason to bid over \$10,000, no matter what their bid would have been in a free market.

The limit has other disadvantages. For example, in the case of timber on public lands which are not suitably located for inclusion in a sustained-yield, cooperative agreement under the act of March 29, 1944 (58 Stat. 132; 16 U. S. C., sec. 583), the value of timber in an area suitable for the activities of only one purchaser may be several times \$10,000. This limitation prevents the most advantageous disposal of timber in such area. In order for the Government to receive the maximum stumpage value and to obtain maximum productivity through prudent forest management, timber should be sold on the basis of natural logging units which may often contain timber worth more than

\$10,000. The limitation, therefore, encourages the cutting of only the most desirable and accessible timber in such unit and the leaving of other timber which frequently should be cut to prevent its deterioration. Furthermore, a timber operator incurs certain expenses for logging roads, equipment, structures, and other improvements which must be amortized during the life of the operation. If a sufficiently large block of timber is not made available in one sale to warrant such necessary expenditures, ordinarily no sale will be consummated. If an operator should submit a bid it would be very low because not being assured of additional supplies of timber in the same area, the entire cost of physical improvements would likely be charged against his small timber allotment. It is also significant to note that all other commercial timber under Federal administration in the United States and Alaska can be sold without a limitation of this kind.

There are on the public lands many materials and resources which can be used profitably for the benefit of local industries and communities and to the disposition of which there is no real objection. There is, however, no permanent legislation under which these may be utilized. The Congress took cognizance of this when it passed the temporary act of September 27, 1944, *supra*. Since that act has expired there is no statutory authority to dispose of these useful materials.

Included in the materials to which it is contemplated the proposed bill would apply are:

1. Timber and other forest products which are not susceptible of management under a sustained-yield program under the act of March 29, 1944, supra, but which may be disposed of in a manner not harmful to the public interest. Important forest products include turpentine and other derivatives of resin, medicinals, aromatics, tannin, and dyes.

2. Sand, stone, and gravel not of such quality and quantity as to be subject to the mining laws but which are desired by local governments, railroads, local industries, ranchers, and farmers for the construction and maintenance of highways, secondary roads, railroads, structures of various kinds, and farm and ranch improvements.

3. Yucca, manzanita, mesquite, cactus, and other desert and mountain vegetation which provides such products as disinfectants and medicinal compounds, soap, food, splints, rope, twine, burlap, baskets, novelties, ornaments, insecticides, and alcohol.

4. Common earth to be used for road fills, earth dams, stock-watering reservoirs, and similar uses.

5. Clay to be used for the manufacture of bricks, tile, pottery, and similar products.

Among the resources listed above, timber and forest products are by far the most important. There still remains under the jurisdiction of the Department of the Interior as scattered tracts or areas outside of existing reservations and outside of the revested Oregon & California grant lands an estimated $3\frac{1}{2}$ to

5 million acres of commercially productive public-domain forest land with an estimated volume of at least 6 billion feet of merchantable saw-timber, valued at 20-25 million dollars. Woodlands comprise a very much larger area and contribute substantially to meeting the needs of local people for poles, fence posts, fuel wood, and similar products. With the expiration of the temporary act, the Department now has no statutory authority to sell this public-domain green timber other than under a sustained-yield agreement under the act of March 29, 1944, *supra*.

An increasing number of applications have been received for the purchase of this public-domain timber. At this time 56 applications are on file for timber in amounts varying in value from several hundred dollars to \$50,000 or more. It may be reasonably assumed that a number of persons did not file applications because of the \$10,000 limitation or because of the temporary nature of the act.

The timber and other forest products on these lands are a renewable resource. Since timber lessens in value each year following maturity, it should be removed at the time it has its greatest value. This Department, as a long-time advocate of conservation and wise land use, is pledged to maintain these forest and wood lands in a state of good productivity. In order to secure the maximum annual growth and thereby obtain such productivity, it is necessary to remove the mature trees, to make cuttings to prevent stands from becoming stagnated, and to employ other established

forest-management practices. These things cannot be accomplished without authority to sell the timber which would be cut under such management practices.

The present shortage of lumber, poles, ties, mine timbers, and other forest products is another impelling reason for disposing of merchantable timber on the public domain in a manner that will benefit the growth and yield of forest stands. Revenues to the Federal Treasury resulting from the proposed legislation would not be insignificant.

This bill would not displace present laws authorizing the disposal of public-land resources, nor would it provide an alternative method of disposal since it would apply "only if the disposal of such materials or resources * * * is not otherwise expressly authorized by law, including the United States mining laws." National forests are specifically excluded from its operation.

The Bureau of the Budget has advised me that there is no objection to the presentation of this proposed legislation to the Congress.

Sincerely yours,

Oscar I. Chapman,
Under Secretary of the Interior.

A BILL To provide for the disposal of materials or resources on the public lands of the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior, under such rules and regulations as he may prescribe, may dispose of materials or resources, including sand, stone, gravel, vegetation, and timber or other forest products, on public lands of the United States if the disposal of such materials or resources (1) is not otherwise expressly authorized by law, including the United States mining laws, (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest. Such materials and resources may be disposed of only in accordance with the provisions of this Act and upon the payment of adequate compensation therefor, to be determined by the Secretary. Where the lands have been withdrawn in aid of a function of a Federal Department or agency other than the Department of the Interior or of a State, Territory, county, municipality, water district, or other local governmental subdivision or agency, the Secretary of the Interior may make disposals under this Act only with the consent of such Federal Department or agency or of such State, Territory, or local governmental unit. Nothing in this Act shall be construed to apply to lands in any national forest, national park, or national monument or to any Indian lands or lands set aside or held for the use or benefit of Indians, including lands

over which jurisdiction has been transferred to the Department of the Interior by Executive order for the use of Indians.

Sec. 2. Where the appraised value of the material or resource exceeds \$1,000, it shall be disposed of by the Secretary to the highest responsible qualified bidder by competitive bidding and publication of notice of the proposed disposal in a newspaper of general circulation in the county in which the material or resource is located. Such notice shall be published for as many times and for such period as the Secretary may prescribe. Where the appraised value of the material or resource is \$1,000 or less, it may be disposed of by the Secretary upon such notice and in such manner as he may prescribe.

Sec. 3. All moneys received from the disposal of materials or resources under this Act shall be disposed of in the same manner as moneys received from the sale of public lands.

No. 14,190

IN THE

United States Court of Appeals
For the Ninth Circuit

SUPERIOR SAND AND GRAVEL MINING Co., INC.,
a corporation,

Appellant,

VS.

TERRITORY OF ALASKA,

Appellee,

and

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE
D. SMITH, JR., LILLIAN E. SMITH, EUGENE E. SAX-
TON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON
and GRACE D. SAXTON, Co-Partners Doing Business
as the Northern Construction Association, and ELLS-
WORTH E. SAXTON, as Agent for Said Association,

Appellants,

VS.

TERRITORY OF ALASKA,

Appellee.

Upon Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

OPINION BELOW.

The opinion of the district court is reported at 114
F. Supp. 436.

JURISDICTION.

The jurisdiction of the district court was invoked
under the Act of January 22, 1880, 21 Stat. 61, as

amended, 43 Stat. 1144, 30 U.S.C. §§ 29 and 30; and the Act of June 6, 1900, 31 Stat. 322, as amended, 48 U.S.C. § 101. The jurisdiction of this court rests on § 1291 of the new Federal Judicial Code.

QUESTIONS PRESENTED.

1. Whether ordinary sand and gravel are “mineral” within the meaning of the mining laws of the United States.

2. Whether leased, reserved school lands in Alaska were subject to claim under the mining laws of the United States at the time of the locations in question.

I. COMMON SAND AND GRAVEL ARE NOT “MINERAL” WITHIN THE MEANING OF THE TERM AS USED IN THE MINING LAWS OF THE UNITED STATES, AND HENCE DEPOSITS OF THESE MATERIALS, AND THE PUBLIC LANDS IN WHICH THEY ARE FOUND, ARE NOT OPEN TO CLAIM AND PURCHASE UNDER THE MINING LAWS.

The right to explore and purchase mineral deposits and to occupy and purchase the lands of the United States in which they are found exists by virtue of the Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. § 22 (1952). In pertinent part this act provides that “all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those

who have declared their intention to become such
* * *”.

For the purposes of the Territory of Alaska's motion to dismiss in this case, granted in the lower court, it was unchallenged that all of the alleged mineral claims involved were made, pursuant to the quoted statutory language, on valuable deposits of common sand and gravel found in lands belonging to the United States. The fact is also clear that no materials other than common sand and gravel useful for general building and construction purposes were discovered on the land (R. 68).

It is beyond controversy that the statute quoted *supra* requires that the deposits upon which mining claims are based, whether lode or placer, must be “mineral”. Thus the question of law is presented whether valuable deposits of common sand and gravel are “mineral” within the scope of the term as used in Title 30, U.S.C. § 22 (1952).

This question is to be distinguished from the question of fact as to whether a substance universally recognized as mineral, as for example gold, occurs in sufficient quantity and quality on any certain land so as to render that land open to occupation and purchase under the mining laws rather than under the homestead or other laws relating to entry on the public lands.

The distinction of these two questions, the former one of law and the latter one of fact, puts in proper perspective the argument made by appellants that the question raised by this case is exclusively for the

Land Office of the U. S. Department of the Interior* and beyond the jurisdiction of the court in this proceeding. Both appellants have asserted that the determination of the mineral or non-mineral character of the land is solely for the Land Office. With this latter proposition, a matter of fact determination, appellee has no argument, but that is not the question raised by the motion to dismiss in this case; rather, the question is whether, as a matter of law, ordinary sand and gravel are considered “mineral” wherever found. Recognizing this distinction, the court below summarily and properly disposed of this objection by indicating the jurisdictional question was not presented by the record (R. 38).

A. The history of the mining laws of the United States, and their judicial and administrative interpretation to 1944, show that Congress did not intend to include sand and gravel within the scope of the term “mineral”.

While the first Congressional declaration with reference to mineral lands may be found in the ordinance of May 20, 1785 (1 Lindley on Mines 163, 3d. ed.), it is sufficient to consider the history of the mining laws from the Act of May 10, 1872, *supra*. This act fixed the policy of the government as to the exploration, development, and purchase of mineral lands which, to all intents and purposes, constitutes the present system. The Congressional intent in using the term “mineral” should first be considered from the time of passage of this act.

*Henceforth this office is referred to as the Land Department, the term indicating both the Department of the Interior and its subordinate agency, or either, as the case may be.

By the well-recognized general rule of statutory construction the word should be interpreted in its ordinary and commonly accepted sense, *U.S. v. Cooper Corp.* 312 U.S. 600, 605, 50 Am. Jur. 228, and as it was understood at the time when the statute was enacted. 50 Am. Jur. 224. This rule was a basis of the executive interpretation of the statute announced by the U. S. Land Commissioner a year after passage of the act. In a circular of instructions of July 15, 1873, the Commissioner enunciated the rule for interpreting the word "mineral" as follows:

In the sense in which the term "mineral" was used by Congress, it seems difficult to find a definition that will embrace what mineralogists agree should be included * * * From a careful examination of the matter, the conclusion I reach as to what constitutes a valuable mineral deposit is this: *That whatever is recognized as a mineral by the standard authorities on the subject*, where the same is found in quantities and quality to render the land sought to be patented more valuable on this account than for the purpose of agriculture, should be treated by the office as coming within the purview of the mining act of May 10, 1872. (*Emphasis added*).

It should be noted that this definition established two basic criteria for ascertaining whether a substance came within the term "mineral", as used by Congress: first, the substance must be recognized as "mineral" by the standard authorities on the subject; second, the substance must be found in quantities and quality to render the land where found more valuable on account of the presence of the substance than for

agricultural purposes. The first of these tests points to the legal question primarily involved in this case, whether the term "mineral" was meant to include sand and gravel; the second test involves the question of fact already noted as not in dispute in this case, the value of the material found being admitted. It is the first test that is of present concern.

Available references as to what standard authorities at the time of passage of the act recognized as "mineral" indicate that not a single one so classified common sand and gravel of the kind here involved. *Zimmerman v. Brunson*, 39 L. D. 310, 312. At least until 1910 there were apparently no applications to purchase such a deposit under the mining laws. *Id.* Webster's Standard Dictionary defined "mineral" as "any inorganic species having a definite chemical composition". Sand and gravel were certainly not within the scope of this well-recognized definition, since these materials are a heterogeneous mixture of indeterminate and widely varying composition.

Sixteen years after passage of the act the U. S. Supreme Court apparently took for granted that sand and gravel were not then within the scope of the term "mineral". In *U. S. v. Iron Silver Mining Company* (1888), 128 U.S. 673, 679, the court was discussing the term "placer claim" as used in the mining laws and said, "By the term 'placer claim', as here used, is meant ground within defined boundaries which contains mineral in its earth, sand, or gravel * * * ". The implication is apparent that earth, sand, or gravel, were not in themselves considered mineral and

subject to placer claim but might be a vehicle containing minerals, as for example auriferous gravel.

No American cases adjudicated by the courts or rulings of the Land Department by the time of passage of the mining act of 1872, or within thirty-five years after then, appear to have held sand and gravel to be "mineral". From the available evidence as to what standard authorities classed as "mineral", it must be concluded that ordinary sand and gravel were not so considered at the time of passage of the act.

Soon after enactment of the mining law of 1872, question arose whether such a frequently occurring substance as building stone, by which was meant rock found in place such as granite, limestone, etc., constituted a mineral deposit. The Land Department held that land containing granite useful for building purposes was not subject to entry under the mining laws. *Conlin v. Kelly* (1891), 12 L. D. 1. And at least one court held similarly regarding limestone. *Wheeler v. Smith* (Wash., 1893), 32 P. 784.

Almost immediately following the Land Department's decision in *Conlin v. Kelly, supra*, the Congress acted to extend the mining laws in order to permit mineral entry upon lands containing such building stone. Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. § 161. This purpose of the act is stated succinctly in *Dunbar Lime Co. v. Utah-Idaho Sugar Co.* (C.A. 8th Cir., 1926), 17 F. 2d 351, 355-356.

Granite, limestone, marble, and other building stones, while of a nature to meet the test for "min-

eral" of having a definite chemical composition, had not been classed as such by standard authorities, as illustrated by the cases cited, *supra*. The fact of the common occurrence of these stones appears to have been a reason for their not being treated as "mineral" by the Land Department or other authorities prior to passage of the Building Stone Act. *Conlin v. Kelly*, *supra*. Since Congress found it necessary to extend the mining laws especially to include these materials, and limited the extension to them, it may properly be reasoned that Congress did not intend to include such frequently occurring substances of indeterminate composition as ordinary sand and gravel within the term "mineral deposits". Had the intention been otherwise, it would have been a simple matter to make it clear by similarly express statutory provision, but this was not and has not been done.

In *Pacific Coast Marble Co. v. Northern Pacific R. Co.*, (1897), 25 L.D. 233, the question arose whether a deposit of marble should be considered "mineral" under the mining laws and other laws relating to disposal of public lands. The parties opposed to the mineral claimant sought to show that only metalliferous deposits were intended to be classed as "mineral" under the various laws.

In a detailed opinion the Secretary of the Interior rejected this contention and held that any substance recognized as mineral by the standard authorities on the subject, where found in quantity and quality to render the land more valuable on account of the deposit than for agriculture, would constitute "a valu-

able mineral deposit". This decision made clear that nonmetallic minerals, such as marble, mica, borax, kaolin, limestone, gypsum, etc., commonly recognized as minerals by standard authorities, were meant to be included within the term "mineral" as used in these laws. While emphasis in this opinion was placed on the test of the value of a deposit as a means of determining whether given land was open to acquisition under the mining laws, the initial test of whether the substance found was recognized as "mineral" by the standard authorities on the subject was retained as fundamental. The non-metallic substances cited in the opinion as examples of deposits open to claim were all generally recognized as minerals and would all meet the test of having a definite chemical composition. There was no suggestion that deposits of non-metallic substances not generally recognized as minerals, such as sand and gravel, would be available for purchase under the mining laws.

The question whether ordinary sand and gravel, suitable for mixing with cement for construction, should be considered "mineral" within the meaning of mining laws was first ruled on by the Land Department in *Zimmerman v. Brunson* (1910), 39 L.D. 310, and it was held that without specific legislation by Congress the Department would refuse to classify deposits of these materials as "mineral". After setting out the Department's test for the determination of minerals, cited *supra*, the opinion observed that no standard American authority classified sand and gravel deposits suitable for building purposes as

“mineral”. As further reason for not classifying these materials, the opinion pointed out the considerable frequency with which such deposits occur in the public domain, which was held to indicate the general understanding that they were not to be regarded as mineral unless possessing a peculiar property or characteristic giving them a special value. The chief value under the facts of this case was proximity of the deposits to a town, and this was held an insufficient basis on which to classify them as “mineral”. The opinion cited cases in which building stone of various types had been classified as nonmineral by the Department, prior to passage of the Building Stone Act, cited *supra*; the inference was that without similar specific legislation by Congress bringing sand and gravel within the mining laws, these latter substances should not be considered mineral. Further support for the conclusion reached by the case was drawn from analogy with deposits of ordinary brick clay, which had been held “non-mineral” in *Dunluce Placer Mine* (1888), 6 L.D. 761, and in *King v. Bradford* (1901), 31 L.D. 108.

Appellants have sought to characterize the decision in *Zimmerman v. Brunson*, *supra*, as an exception and departure from the rule of interpretation of the term “mineral” fixed by the Land Commissioner in 1873 and affirmed in *Pacific Coast Marble Co. v. Northern Pacific R. R. Co.*, *supra*. (Brief of Schubert, et al., pp. 6-7). This characterization fails to consider the first element of the rule, that the substance must be one generally recognized by standard authorities as

mineral, and is thus a misinterpretation of the import of the latter decision as well as of the stated rule.

In *Holman v. State of Utah* (1912), 41 L.D. 314, the Land Department, in again considering deposits of ordinary clay, held that they should not be classed as "mineral" under the mining laws. The principal reason supporting the decision was stated by the Department to be as follows:

"It is not the understanding of the Department that Congress has intended that lands shall be withdrawn or reserved from general disposition, or that title thereto may be acquired under the mining laws, merely because of the occurrence of clay or limestone in such land, even though some use may be made commercially of such materials. There are vast deposits of each of these materials underlying great portions of the arable land of this country. It might pay to use any particular portion of these deposits on account of a temporary local demand for lime or for brick. If, on account of such use or possibilities of use, lands containing them are to be classified as mineral, a very large portion of the public domain would, on this account, be excluded from homestead and other agricultural entry. It is safe to say that every kind of material found in land in its natural state may under some circumstances be put to non-agricultural uses. Local demand for building of levees or railroad embankments, filling up low places and the like, may make any particular land more valuable for the time on account of the material it contains than on account of its agricultural possibilities, but it is clear that such considerations can not be given weight in determining what lands are reserved

for special disposition because mineral in character. In one sense, all land except portions of the top soil is mineral. The term, however, in the public-land laws is properly confined to land containing materials such as metals, metalliferous ores, phosphates, nitrates, oils, etc., of unusual or exceptional value as compared with the great mass of the earth's substance. It is not intended hereby to rule that there may not be deposits of clay and limestone of such exceptional nature as to warrant entry of the lands containing such deposits under the mining laws."

The reasoning of this statement applies as well to sand and gravel as to clay, and as a matter of fact the Land Department has never distinguished between these materials in considering the application of the mining laws to them.

What appears to have been the first judicial consideration of the application of the mining laws to a substance of the kind here involved was made almost immediately following the Land Department's decision in *Zimmerman v. Brunson*, *supra*. The Supreme Court of Oregon, in *Loney v. Scott* (1910), 112 P. 172, held that sand useful for building purposes should be considered as "mineral" under the mining laws. This opinion was based primarily on the ground that the land involved was more valuable for the building sand it contained than for agriculture.

As recognized in the opinion of the court below (R. 36) this proposition made value of the material a sole test of whether a substance should be classed as "mineral", disregarding the factor of chemical com-

position of the substance, which was a prime element of the definition of "mineral" as used by standard authorities. Such a test would render the content of the word "mineral", as used in the mining law, frequently variable according to place or time, the value of such material as sand and gravel being often principally dependent upon the proximity of the deposit to a town or city. This text was rejected by the Land Department in *Zimmerman v. Brunson*, *supra*, apparently for the reason that it did not furnish a sufficiently definite standard upon which to determine whether a substance should be classed as "mineral" under the mining laws.

The Oregon court cited no standard authority on the question as to whether sand or gravel should be classed as "mineral", and hence its consideration of the question failed to meet the authoritative, well-recognized test used by the Land Department in applying this Federal law. A reference was made to an annual report of the U. S. Geological Survey on the mineral resources of the United States in which building sand was shown to have been produced in large quantities in the year of the report. This of course indicated the financial value of this material produced, but as the report was one evidently not concerned with the application of the mining laws, it was not of significant value for determining a question of first impression of such importance to the administration of the public lands as was facing the court.

The only other authority used by the Oregon court in arriving at its conclusion was *Northern Pacific*

Railway Co. v. Soderberg, 188 U.S. 526 (1902). The question involved in that case was whether a deposit of granite used as building stone was "mineral" within the terms of an act of Congress of July 2, 1864, 13 Stat. 365, c. 217, granting certain lands to the railway company but excepting "mineral lands" from the grant. The defendant had subsequently established a mineral claim on the disputed land, apparently under the Building Stone Act, *supra*, and plaintiff sought to show the claim invalid on the ground that the land was not "mineral" and hence had passed to the railway company under the grant act of 1864.

It is plain that the *Soderberg* case, on its facts, cannot afford good precedent value for the conclusion reached in *Loney v. Scott*. The substance involved in the former case was granite found "in place" and clearly recognized as within the scope of the mining laws, at the time of both decisions, by virtue of the Building Stone Act of 1892. To extend the holding on these facts to the question of whether sand and gravel should be considered as "mineral" under the mining laws was entirely unwarranted since neither the substance involved nor the statute being interpreted were the same. And the list of other materials cited in the *Soderberg* case as having been considered "valuable mineral deposits", while it included building stone, such as granite, made no mention of sand useful for building purposes.

Because its finding, that building sand comes within the scope of the word "mineral", is based upon an uncertain guide for determining the meaning of

the term and upon precedent which does not warrant this conclusion, *Loney v. Scott* should be rejected as authority on the issue.

The most fully-considered pertinent court decision was rendered in *U. S. v. Aitken, et al.* (1913), 25 Phil. 7, where the court was considering the question raised herein under a Congressional statute of identical wording applying the mining laws to the Philippine Islands. Act of July 1, 1902, Section 20, 32 Stat. 691, 697. In this case the contention that sand and gravel should be considered "mineral" was rejected on several grounds.

Sand and gravel were shown to fail the scientific test of a "mineral" in not having a definite chemical composition. The court reviewed its search of standard authorities and indicated that none had reported sand and gravel as minerals, thus showing that these materials failed to meet the test fixed by the Land Department to determine whether a substance was "mineral" under the mining laws. The argument that Congress had not extended the mining laws to sand and gravel, while doing so in the case of building stone, petroleum, saline lands, and other substances, was fully stated. The court recognized that Congress must have been aware of the valuable uses to which sand and gravel were commonly being put, including commercial uses such as the making of concrete, and hence the failure to extend the mining laws to include these materials, otherwise generally considered non-mineral and already ruled to be so by the Land Department, was held to indicate the Congres-

sional intent not to make these materials subject to mineral claims. *Zimmerman v. Brunson* was cited with approval.

The court indicated that such materials as sand and gravel had never been considered, generally or by the Land Department, as building stone, only rock "in place" and quarried being treated as such, thus showing that sand and gravel were not within the scope of the Building Stone Act of 1892. The further reason for holding lands bearing deposits of sand and gravel not open to mineral entry was stated that since these are valuable road-building materials, and the government is primarily responsible for the construction of public roads, it would be obviously unwise and unreasonable for the government to divest itself of their ownership, only to have to repurchase them in order to discharge the road-building function.

On its reasons as cited, and its supporting authority, the fully-considered opinion of the *Aitken* case should be followed as the leading precedent on the question at issue.

The Land Department in *Layman v. Ellis*, 52 L.D. 714 (1929), reversed its holding in the *Zimmerman* case and held land valuable on account of sand and gravel deposits subject to entry under the mining laws. In support of this holding the Department cited the listing of sand and gravel as a "mineral resource" by the United States Geological Survey and indicated that the material was valuable for use in trade, manufacturing and the mechanical arts. The reasoning that

the mere fact of a substance found in the earth being valuable should constitute it a "mineral" under the mining laws has already been rejected. The opinion stated expressly that the test of having a definite chemical composition should not be considered the sole test of whether a substance is "mineral". From this it was apparently assumed that the test should not be used at all. While it may be true that the requirement of having a definite chemical composition should not be the sole test of whether a substance is "mineral" under the mining laws, yet on reason it would appear to be a proper and necessary consideration if the word "mineral", as used in the mining laws, is to have a predictable, definite content. The opinion should be held in error in rejecting this consideration as an element of the test of whether a substance is "mineral".

The opinion cites *Northern Pacific Railway v. Soderberg* and *Loney v. Scott* in support of its construction of the statute. As argued in the consideration of *Loney v. Scott*, these two cases should not be held to support a finding that sand and gravel are "mineral" under the mining laws of the United States.

The Land Department followed the rule of *Layman v. Ellis* in an opinion of the Acting Solicitor, 54 L.D. 294 (1933), and in *U. S. v. Barngrover*, 57 L.D., 533 (1942), the latter case applying the rule to desert clay and silt. For the reasons already stated, this line of decisions should be rejected as an interpretation of the mining law.

Appellants argue that Congress has inferentially agreed with the view expressed by *Layman v. Ellis*, or else corrective legislation would have been enacted following that decision (Brief of Schubert, et al., p. 15). This line of argument might be applied with more force to reach an opposite conclusion. For the thirty-eight years from the passage of the Act of May 10, 1872, *supra*, until the decision in *Zimmerman v. Brunson* in 1910 the Congress acquiesced in a policy which apparently did not recognize mineral claims on deposits of ordinary sand and gravel. And when this policy was made express by the latter decision, the Congress took no action to change it during all of the intervening years until the *Layman v. Ellis* case. This should be viewed in contrast with the quick action taken by Congress in the most closely analogous situation: passage of the Building Stone Act of 1892 within a year of the Land Department's denial of the mineral claimant's rights sought to be recognized in *Conlin v. Kelly, supra*.

B. By passage of the Materials Act in 1944 the Congress made further evident its intent that sand and gravel are not subject to mineral claim.

While it should appear sufficiently clear that common sand and gravel ought not to be considered as "mineral" under the mining laws prior to 1944, an expression of Congressional intent made that year provides further convincing evidence that these substances are not to be disposed under the mining laws. In the Act of September 27, 1944, P. L. 429, 78th Cong. 2d. Sess. the Congress provided specifically

for the disposition by sale of sand, gravel, and certain other materials from the public lands of the United States. This act was temporary, but its provisions were extended and made permanent by the Materials Act of July 31, 1947, 61 Stat. 681, 43 U.S.C. § 1185 *et seq.* By the terms of the latter act, the Secretary of the Interior was given authority to dispose of such materials as sand, stone, gravel, common clay and other substances on the public lands of the United States, if the disposal of such materials was not otherwise expressly authorized by law, including the United States Mining laws, and upon other conditions not relevant here.

It is axiomatic that laws relating to the disposal of public lands should be construed *in pari materia* and that, therefore, the mining laws should be considered as only a part of the statutory provisions relating to the disposition of public lands. Following this rule, it should be found that the Materials Act and the mining laws are complementary and that the substances authorized to be disposed under the Materials Act are not to be disposed under the mining laws. This proposition follows not only from the rule of construction stated but from the legislative history and the terms of the Materials Act, upon reason, and upon the authority of recent decisions of the Land Department.

As noted, the Materials Act states that the listed substances may be disposed under its terms only if not otherwise expressly authorized to be disposed by other laws, including the mining laws. It is clear

that common sand and gravel, as involved in this case, and clay, are not expressly authorized to be disposed under the mining laws. This limiting expression of the Materials Act may most reasonably be construed to apply to such substances as building stone, stone being one of the substances listed under the Act but building stone being expressly provided for under the mining laws, specifically 30 U.S.C. § 161. Appellants, in arguing otherwise (Brief of Schubert, et al., pp. 16-17), have disregarded the use and significance of this term, "expressly", as it appears in the Materials Act at 43 U.S.C. § 1185, (1). In emphasizing the phrase from the Materials Act, "including the United States mining laws", appellants apparently infer that sand and gravel are "mineral" under the mining laws, and thus they beg the question primarily at issue in this case.

The legislative history of the Materials Act likewise indicates that ordinary sand and gravel, as involved here, were not considered as coming within the scope of the mining laws, and that the Act was intended to provide for a manner of disposal of the listed materials which was exclusive of that provided under the mining laws, although complementary to and not inconsistent with the operation of those laws. This is shown by communications in support of the legislation addressed by the Department of the Interior to the Senate and House committees considering the measure; pertinent parts of these communications appear in the Brief of Schubert, et al., at Appendix pp. 15-16 and 27-28. The Department stated, *inter*

alia, that "There are on the public lands many materials and resources which can be used profitably for the benefit of local industries and communities and to the disposition of which there is no real objection. *There is, however, no permanent legislation under which these may be utilized.*" The communications then proceeded to list the materials of this class, and the list included "2. Sand, stone, and gravel not of such quality as to be subject to the mining laws * * *"

That the sand and gravel concerned in this case are of this common, ordinary character to be disposed under the Materials Act and not under the mining laws is shown by the fact that the Department of the Interior was already disposing of sand and gravel from the land involved under the provisions of the Materials Act when the mining claims at issue in this case were made (R. 4, 33, 53).

It may be noted parenthetically that appellee does not argue that sand and gravel of unique or special quality may not be classed as "mineral" and be subject to claim and purchase under the mining laws. Deposits of sand bearing a high percentage of silica, which is useful in the manufacture of glass or as an agent in the steel-making process, furnish an example of sand having a special quality making it subject to claim and purchase under the mining laws. Sand of this quality would of course meet the test of having a definite chemical content and would no doubt have been recognized as "mineral" by the standard authorities on the subject at the time of passage of the Mining Act of May 10, 1872.

That substances disposed under the Materials Act should not be held to come under the mining laws may be reasoned by analogy with the mineral leasing laws. Materials disposed under the mineral leasing laws are treated exclusively under the terms of these laws and may not be obtained under the mining laws. This proposition is stated expressly in the regulations of the Land Department relating to the mining laws, specifically 43 *C.F.R.* Sec. 185.2. This regulation is the successor to the rule of July 15, 1873, *supra*, relating to the definition of "mineral" under the mining laws. The regulation as now promulgated states in part as follows: "Deposits of coal, oil, gas, oil shale, sodium, phosphate, potash and in Louisiana and New Mexico sulphur, belonging to the United States, can be acquired under the mineral leasing laws and are not subject to location and purchase under the United States mining laws."

The Land Department in *Matter of Van Dolah*, Land Department case A-26443, decided October 14, 1952 (Appendix, p. vii), held in effect that a substance disposed under the Materials Act may not be disposed under the mining laws. This case concerned a disposition of common clay, and since it was one of the materials listed in the Materials Act, it was held that unless the clay had some peculiar, distinguishing characteristic for which it was especially valuable, it was properly disposed under the Materials Act and the land containing it would not be open to mineral entry. The opinion cites as further authority for this proposition Solicitor's Opinion M-36044,

July 7, 1950, and M-36056, November 10, 1950. While the *Van Dolah* case concerned clay, the Department, as has been noted, has never distinguished common clay from sand and gravel in considering whether these substances were subject to the mining laws. Hence, it is implicit in the *Van Dolah* decision that the *Layman v. Ellis* case and others following it should not be considered as properly interpreting the law regarding sand and gravel subsequent to the passage of the Materials Act.

C. Recent judicial decisions hold sand and gravel not "mineral" as the term is ordinarily used.

While, as has been stated, only two reported court decisions appear on the precise question of whether sand and gravel are "mineral" within the meaning of the mining laws, there are numerous recent decisions holding these substances to be "non-mineral" where the question has arisen in other contexts outside the mining laws. Most frequently the question has been whether, in deeds or other conveyances of land reserving minerals therein to the grantor, it was intended to include sand and gravel within the term "mineral". Cases holding directly on sand and gravel include *Psencik v. Wessels* (1947) 205 S. W. 2d 658; *Winsett v. Watson* (1947) 206 S. W. 2d 656; *Watkins v. Certain-Teed Products Corp.* (1950) 231 S. W. 2d 981; *Eldridge v. Edmondson* (1952) 252 S. W. 2d 605. Other pertinent cases include *Puget Mill Company v. Ducey* (Wash. 1939) 96 P. 2d 571; *Holloway Gravel Company v. McKowen* (La. 1942) 9 S. 2d 228, 230; *Beck v. Harvey* (Okla. 1944) 164

Pac. 2d 399; *Hans v. Great Bend Brick and Tile Company* (Kans. 1952) 241 Pac. 2d 475, 478; cf., *Heinatz v. Allen* (Texas 1949) 217 S. W. 2d 994, concerning limestone. The subject is annotated at 1 A.L.R. 2d 788.

II. THE LANDS EMBRACED WITHIN THE PLACER MINING CLAIMS IN THE COMPLAINTS WERE NOT AVAILABLE FOR MINING LOCATION UNDER THE TERMS OF THE ACT OF MARCH 4, 1915, 38 STAT. 1214, AS AMENDED BY THE ACT OF AUGUST 7, 1939, 53 STAT. 1243, 48 U. S. C. SEC. 353.

The lands under consideration herein were reserved by the Act of March 4, 1915, 38 Stat. 1214, for purposes of support of the common schools of Alaska. The amendatory Act of August 7, 1939, 53 Stat. 1243, made the land and the minerals therein subject to disposition under the mining and mineral leasing laws of the United States. The question raised is whether the particular lands involved in this case were open to such disposition at the time the mineral claims alleged by the complaints were established. At this time these lands were under leases granted by the Territory of Alaska to various parties for purposes of surface development and use (R. 52-55, 71-77).

A. Under the terms of the so-called School Reserve Law as amended, mineral entries could not be made in the absence of rules and regulations by the Secretary of the Interior relating to such entry and the fixing of conditions by the Secretary providing for compensation to lessees for damage to improvements on the leased lands.

1. The Secretary of the Interior had not issued rules and regulations for the purpose of carrying into effect the amendment permitting disposition of the land under the mining laws.

The amendatory Act of August 7, 1939, *supra* authorized the Secretary to make all necessary rules and regulations in harmony with the provisions and purposes of the Act for the purpose of carrying it into effect. Up to the time of the alleged mineral entries and to date the Secretary has not promulgated any such rules and regulations. It is obvious that opening pits to extract materials from the land, the surface of which is being used, may cause damage to the surface use. It would clearly result in chaos and controversy for unregulated mineral entry to be allowed upon leased "school section" lands. Hence it should be held as the reasonable interpretation of the amendatory act that no such entry could be made until the Secretary had implemented the act by making proper rules and regulations concerning such entry. Since no such rules and regulations have yet been made, it should be held that mineral entry was not authorized.

While it may be argued that the Secretary should have acted to promulgate the necessary regulations long before the time of the mineral entries made herein, it would appear that the proper remedy against any failure of duty in this regard would

have been an action to compel performance of the duty, or merely to have made a timely appeal to the Secretary to state what regulations, if any, might be applied. That there had been delay in establishing rules and regulations would furnish no warrant for indiscriminate entry and location of mineral claims, and especially in the face of prior dispositions and leases of the school section land by the Territory.

The need for regulations prior to the opening of the land for entry is shown by analogy to the unwritten but recognized policy of the Land Department of prohibiting location of minerals reserved from disposition upon so-called "Small Tract" lands until such time as the Secretary of the Interior promulgates regulations defining the terms and conditions for the making of such locations.

2. No conditions providing for compensation to any Territorial lessee for damages to crops or improvements on this land had been fixed at the time of the mineral entries alleged.

Under the terms of the amendatory Act of August 7, 1939, *supra*, the lands herein were to be subject to disposition under the mining laws upon conditions providing for compensation to any Territorial lessee for any resulting damages to crops and improvements on the lands. No such conditions had been fixed concerning the mineral entries herein alleged to be made. Congress could not have intended that such conditions were to be left to determination by the parties involved, as such policy could only result in unregulated controversy and would be unreasonable. It was incumbent upon prospective mineral locators at least

to ascertain from the Territory, in possession of and administrator of the reserved lands, what conditions for compensation to lessees applied before mineral entry could be made, and to obtain the consent of the Territory to the making of the locations. To hold otherwise would be to interpret the Act of August 7, 1939, unreasonably, since the result might well be, as in this very case, to defeat the purpose of the school reserve law itself, *i.e.*, to benefit the Territorial school fund. An example of the procedure of obtaining consent had in fact already been set and was a matter of public record at the time the mineral entries herein were made. This was in the case of the granting of the contract to the Anchorage Sand and Gravel Company, Inc., for the purchase of gravel from this land under the Materials Act; the Governor of Alaska granted permission to the Bureau of Land Management for the execution of the contract, and approval was also had from the City of Anchorage, lessee of the lands from which the gravel sold was to be extracted (R. 53). Since no conditions providing for compensation to lessees had in fact been made regarding these mineral entries upon leased, reserved land, and since the Territory did not consent to the making of the locations, it must be held that the entries were not authorized under the school reserve law as it then existed.

- B. The subject lands were leased for purposes of making surface uses, and it would be unreasonable to permit incompatible uses and the destruction of the surface by extraction of gravel at the will of mineral locators.**

This school reserve section was, at the time of the mineral entries alleged herein, entirely under lease, pursuant to the authority of Chapter 101, Session Laws of Alaska 1933, Sections 47-2-78 to 47-2-81, ACLA 1949, for purposes of making and developing surface uses (R. 52-55, 71-77). Exceptions to these were limited, defined areas from which gravel was being extracted under permit or contract for purchase of the material. It is obvious that the uncontrolled extraction of gravel would destroy the surface value of the land for business or residential purposes. On reason, therefore, it should be held that even though under the existing law mineral entries might be made on school lands, such entry should not be allowed where the particular mining activity is entirely incompatible with surface uses already being made. This proposition was enunciated in *U. S. v. Lindemuth* (1953) 110 F. S. 621, where the reasoning was stated in support of a holding that mineral entry for purposes of the extraction of gravel would not be allowed on lands being used for airport purposes. It is true that there had been a withdrawal of the land for airport purposes in that case, but the reasoning referred to applied as well in this case where mining activity of a type which results in complete destruction of the surface is entirely incompatible with uses and surface development plans sanctioned by the Territory as the public agency in control of these reserved lands. See also *U. S. v. Morley, et al.*, No. A-7680

in the U. S. District Court of Alaska, Third Division, in an unreported opinion of December 17, 1952 (Appendix p. i). The proposition here made would not reflect against mining activity of a type compatible with the surface uses, as for example tunneling or the sinking of shafts to extract minerals from lode deposits.

C. To permit the mineral entries made herein would defeat the purpose of the school reserve law.

It is common knowledge and obvious on the face of the statute that the Act of May 4, 1915, was passed to provide additional financial support for the operation of the common schools of Alaska. The amendatory Act of October 7, 1939, was passed to permit mineral entry on the school reserve lands in the contemplation that mineral development of the lands would enhance the proceeds from their use and thus benefit the school fund. Subsequent to the making of the very mining locations involved herein, it became apparent that, in fact, the benefit from use of the lands thus located would accrue almost entirely to the locator and not to the Territorial School Fund as was intended. The Congress, therefore, acted to correct the situation by passing the Act of March 5, 1952, 66 Stat. 14, which repealed the earlier amendment making school reserve lands subject to location under the mining laws. House Report No. 559, 82nd Congress, First Session, (Brief of Schubert, et al., appendix pp. 2-10) makes clear the history and purpose of the Act of August 7, 1939, as well as the Act of March 5, 1952, and shows that it was never the intent of the Congress to permit mining activity of a

character which would operate to the detriment of the very purpose for which the basic law was written, *i.e.*, to benefit the Territory's School Fund.

With this knowledge of the intent of the Congress when it provided by the Act of August 7, 1939, for mineral entry on school reserve lands, no construction of that law should be made which would allow the defeat of that intent and purpose if a reasonable construction otherwise is possible. It is certain that to construe that law to permit the mineral claims alleged herein would result in defeat of the purpose of the school reserve law; this is made clear by the House Report cited, *supra*. It should therefore be held that in the absence of rules and regulations covering mineral entry on this land, in the absence of fixed conditions upon which prior lessees would be compensated for damage due to mining operations, and where the type of mining activity contemplated is of a character incompatible with surface uses already being made, then mineral entries such as those alleged herein were unauthorized and illegal under the law existing at the time said entries were made.

CONCLUSION.

A consideration of the history and purpose of the mining laws of the United States and of their judicial and administrative interpretation indicates that ordinary sand and gravel was not intended to be classed as "mineral" within the meaning of those laws.

The review of cases and authorities made herein furnishes sufficient basis for this proposition. And

the Congress has recently made its intent more clear by passage of the Materials Act, providing an original and exclusive means for disposition of sand and gravel from public lands.

From these considerations it must appear that there was no discovery of mineral in this case such as to support the location of placer claims under the mining laws of the United States.

But even if ordinary sand and gravel were to be considered as affording a basis for placer mining claims, the lands here involved were not open to mining claims for the surface extraction of these materials. The lands, reserved for the support of the schools of Alaska, were under lease for prior uses inconsistent with the extraction of gravel, and to permit mining of this character in these circumstances would defeat the purpose of the reservation.

For the reasons stated and upon the authorities cited, it is respectfully submitted that the judgment of the district court should be affirmed.

Dated, Juneau, Alaska,
August 16, 1954.

J. GERALD WILLIAMS,
Attorney General of Alaska,
THOMAS B. STEWART,
Assistant Attorney General of Alaska,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

*In the District Court for the District of Alaska
Third Division*

No. A-7680

United States of America, ex rel.,
Lowell M. Puckett, Regional Admin-
istrator, Bureau of Land Manage-
ment,

Plaintiff,

vs.

Gordon H. Morley and Wesley E.
Edwards,

Defendants.

OPINION

Seaborn J. Buckalew, United States Attorney, At-
torney for Plaintiff.

Defendants—pro se.

This suit arose out of the location by the defendants of placer mining claims for the purpose of removing the gravel therefrom on land immediately adjoining the incorporated City of Anchorage, Alaska, lying northerly of and adjoining what is known as the Fourth Addition to the City and about 1500 feet

north of Merrill Field Airport. The United States Government, upon relation of Lowell Puckett, Regional Administrator, Bureau of Land Management at Anchorage, Alaska, brought the suit to enjoin the defendants from removing the gravel from the claim so located.

The land involved had been "withdrawn from settlement, location, sale, entry or other disposition and reserved for townsite purposes" by lawful Executive Orders 1919 $\frac{1}{2}$ dated April 21, 1914, which was amended and enlarged by Executive Order 3672, dated May 8, 1922. It appears incontestible that those orders effectively served to withdraw the land from location as placer mining claims.

Under the Act of Congress of August 30, 1949, 63 Stat. 679, Title 48, Sections 364a to 364e inclusive, U.S. Code, generally known as the Alaska Public Sales Act, and hereinafter referred to as the "Act", and the rules and regulations made thereunder, the lands were classified for sale and sold to various purchasers on April 19, 1952. The defendants' notice of location of placer claim is dated and was filed for record in the office of the United States Commissioner and Recorder at Anchorage, Alaska, on April 18, 1952.

The Act provides that patents may be issued to the purchasers of land at such sales under the conditions and subject to the restrictions provided in said Act and the rules and regulations made in accordance therewith. The Act contains a reservation to

the United States of all minerals in the lands so sold and patented together with the right to prospect for, mine and remove the same. Section 364c containing that reservation is here quoted:

“Patents under said sections shall issue only after survey, and shall contain a reservation to the United States of all minerals in the lands patented, together with the right to prospect for, mine, and remove the minerals, and such other reservations as may be necessary and proper: Provided, That, notwithstanding the provisions of any Act of Congress to the contrary, any person who hereafter prospects for mines, or removes any minerals from any land disposed of under said sections shall be liable for any damage that may be caused to the value of the land and tangible improvements thereon by such prospecting for, mining, or removal of minerals. Nothing in this section shall be construed to impair any vested right in existence on August 30, 1949.”

The Government asserts that the land was not open to location under the placer mining laws because it had been withdrawn from settlement, location, entry or other disposition and reserved for townsite purposes by the Executive Orders above mentioned, and that the Act segregates the land from mineral location until actual patent is issued to the surface owner as provided in the rules and regulations made pursuant to the Act, 43 C.F.R. 1951, Supp., embracing the following:

“Sec. 75.29 Effect of application; segregation of land. (a) Subject to valid prior rights, the filing of an application in conformity with the

regulations in this part will segregate the land applied for from application, entry, or settlement under any public land laws or from mining locations except as provided in Sec. 75.39, pending classification of the land under the act. * * *

“Sec. 75.35 Certificate of purchase; rights and limitations; survey. (a) When the regional administrator is satisfied that the successful bidder is qualified, that he has the intention and financial means to develop and use the land in accordance with the act and his proposed utilization program, the regional administrator will authorize the issuance by the manager of a certificate of purchase on Form 4-1139, containing the reservations as listed in the published notice of sale. * * *

“Sec. 75.37 Termination of certificate; removal of improvements. (a) At the end of three years from the date of issuance, unless there is then pending an application for the issuance of a patent filed in accordance with Sec. 75.38, the certificate of purchase will be void and of no further effect, all rights thereunder will terminate; and no moneys paid thereon may be returned. No extension of time for compliance with the terms of the certificate of purchase can be granted. (b) Thereupon the manager will allow the approved holder of the certificate of purchase 90 days from notice within which to remove from the land any materials, improvements, structures, or other property placed thereon. After the 90-day period or any extension thereof granted by the manager because of adverse climatic conditions or other sufficient cause, all such materials, improvements, struc-

tures, and property not removed will become the property of the United States. * * *”

That placer mining locations may be made only upon public land that has not been legally reserved or appropriated to any other use and purpose is too well settled to admit of debate. *Copper Belt Silver and Copper Mining Company*, 51 LD 475, 479; *El Paso Brick Company v. John H. McKnight*, 233 U.S. 250. So the primary question to be resolved here is whether under the various laws, Executive Orders and rules and regulations referred to, including the general mining laws of the United States, the land involved in this litigation was open to location for placer mining at the time of its location by the defendants.

It is here found as a matter of law, that the land was reserved from mining location by the Executive Orders of April 21, 1914 and May 8, 1922, and that under the circumstances here presented, such reservation so made exists until actual patent is issued to the surface owner upon sale made under the Act. Therefore, when the defendants Morley and Edwards attempted to locate the land as placer ground on April 18, 1952, it was not open to such location under the laws of the United States.

It is asserted in the pleadings and confirmed by common knowledge, that the removal of the “minerals”, i.e., the gravel from the land, (2 Lindley on Mines, 3rd Ed. Sec. 428, p. 1014) would entirely destroy its usefulness to the owner who purchased

it at the sale made under the Act. Such a mining operation would almost certainly leave in the tract designed for housing and for use as commercial purposes, a deep and unsightly and probably unsanitary pit surrounded by a settled community on the very margin of the City of Anchorage and in the midst of its populated area. While the Act provides for damages only, it seems clear that the equity powers of the Court may be rightly invoked to prevent unlawful and irreparable damage in the first instance.

The permanent injunction prayed for may be granted.

Findings of fact and conclusions of law in accordance herewith may be prepared and submitted.

Dated at Anchorage, Alaska, this 17th day of December, 1952.

/s/ Anthony J. Dimond,
District Judge.

United States
 Department of the Interior
 Office of the Secretary
 Washington 25, D.C.

A-26443

October 14, 1952

Mrs. A. T. Van Dolah Anchorage 015083, 018026
 Contract under Materials Act
 held invalid; application to
 purchase material rejected.
 Affirmed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mrs. A. T. Van Dolah has appealed to the head of the Department from a decision by the Assistant Director of the Bureau of Land Management dated January 5, 1952, affirming a decision dated May 21, 1951, by the Regional Administrator, Region VII, which declared that a one-year contract (Anchorage 015083) entered into with Mrs. Van Dolah on February 17, 1950, pursuant to the Materials Act (43 U.S.C., 1946 ed., Supp. V, secs. 1185-1188) for the sale of clay from an unsurveyed area near Anchorage, Alaska, was invalid, and which rejected her application (Anchorage 018026) under the Materials Act for a new contract to purchase clay from the land included in the contract Anchorage 015083.

On May 29, 1949, the land involved in this proceeding was withdrawn "from all forms of appropriation under the public land laws, including the mining and mineral-leasing laws", and was reserved under

the jurisdiction of the Secretary of the Interior pending the relocation of a portion of the Anchorage-Seward highway (Public Land Order No. 576, 43 CFR, 1951 Cum. Pocket Supp., pp. 177-180).¹

On February 17, 1950, a contract Anchorage 015083 was executed pursuant to the Materials Act by the Acting Regional Administrator, Region VII, for the sale to the appellant during the ensuing year of 1,000 cubic yards of common clay from land reserved by Public Land Order No. 576. Various circumstances prevented the removal of clay pursuant to the contract during the year following the date of its execution.

In a letter filed on January 8, 1951, the appellant requested an extension of time within which to perform the contract. This request was rejected upon the ground that it had not been filed within the time prescribed by section 8 of the contract—i.e., “not less than 90 nor more than 150 days prior to the expiration of the contract.”

Thereupon, the appellant filed an application for a new contract covering the purchase of clay from the same land. This application was rejected by the Regional Administrator, whose decision also declared that the contract Anchorage 015083 had been entered into without proper authority and, therefore, was invalid.

¹On December 7, 1944, the land had been withdrawn from all forms of appropriation under the public-land laws and reserved for the use of the War Department by Public Land Order No. 253 (43 CFR, 1946 Supp., pp. 6341-2). That order remained in effect until the issuance of Public Land Order No. 576.

After an affirmance of the Regional Administrator's decision by the Assistant Director of the Bureau of Land Management, the present appeal to the head of the Department was taken.

Public Land Order No. 576 prohibits all forms of appropriation under the public-land laws of the land involved in this proceeding. Ordinarily, soil and mineral deposits in land are regarded as part of the land until severed from the land.²

Neither the language of Public Land Order No. 576 nor the purpose for which the land was withdrawn from appropriation under the public-land laws suggests an intention to exclude disposals under the Materials Act from the scope of the order. Accordingly, it is concluded that the Materials Act is a public-land law within the meaning of Public Land Order No. 576, and that a contract under the Materials Act for the sale of clay would constitute an appropriation of land under the public-land laws within the meaning of that order.

Thus, it appears that the execution of the contract Anchorage 015083 was not authorized, and that there was no basis for granting the appellant's request for an extension of the time for the performance of the contract, even if the appellant had filed a timely request for such extension. In any event, no extension of the one-year contract Anchorage 015083 was actually granted.

²II Tiffany, *The Law of Real Property*, Sec. 587 (Third Ed.).

The considerations mentioned above apply likewise to the appellant's application (Anchorage 018026) for a new contract to purchase clay on the same land. The application cannot be allowed as long as Public Land Order No. 576 prohibits any appropriation of this land under the public-land laws.

The record indicates that some consideration is being given to the modification of Public Land Order No. 576 with respect to the land involved in this proceeding for the purpose of opening the land to mining location. In fact, the appellant asserts that she has located mining claims on the land with respect to the clay deposits.³

The Department has held that deposits of common clay cannot be patented under the mining laws, although land containing clay of an exceptional nature may be subject to mining location and patent. *Holman et al. v. State of Utah*, 41 L.D. 314 (1912).

If (disregarding the existing withdrawal order) the land involved in this proceeding is subject to location and patenting under the mining laws because of the value and kind of the clay deposits on the land, such deposits are not subject to sale under the Materials Act (Solicitor's Opinion M-36044, July 7, 1950; Solicitor's opinion M-36056, November 10, 1950; 43 U.S.C., 1946 ed., Supp. V, sec. 1185).

³Aside from any other consideration, any such claims which were located on or after May 29, 1949, are invalid, because Public Land Order No. 576 withdrew the land in question from mining location on and after that date.

On the other hand, common clay is one of the materials that is designated in the Materials Act as subject to disposition under the act. In considering the meaning of the term "common clay" as it is used in the Materials Act, it may be noted that, prior to the passage of the act, the Under Secretary of this Department stated that the proposed bill would apply to "clay to be used for the manufacture of bricks, tile, pottery, and similar products", in addition to, and as distinguished from, "common earth to be used for road fills, earth dams, stock-watering reservoirs, and similar uses".⁴

The Assistant Director's decision, in effect, rejected the appellant's application for a new contract under the Materials Act for the reason that the deposits applied for are subject to location under the mining laws. This conclusion appears to have been based upon the appellant's belief that the clay has unusual qualities.

The only evidence in the record concerning the kind of clay deposits in this land consists of assertions by the appellant that "by using a process developed by us", fire resistant products and ceramics can be manufactured from this clay, and the appellant's reply to a question in application 018026 that the material desired is pottery clay. Such evidence in itself does not provide an adequate basis for determining that the clay is subject to mining location and hence, is outside the scope of the Materials Act, particularly since

⁴Sen. Rep. No. 204, 80th Cong., 1st Sess. (1947), p. 3.

the same material is described as common clay in contract Anchorage 015083.

Accordingly, in the event that Public Land Order No. 576 is modified with respect to this land, and other applications for these deposits are filed under the Materials Act or mining locations are attempted, it appears that objective factual data or expert opinions will be necessary in order to arrive at a proper determination regarding the character of the clay deposits on this land.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F.R. 6794), the decisions below holding that contract Anchorage 015083 was invalid and that application Anchorage 018026 must be rejected are affirmed; but this affirmance is without prejudice to any efforts that the appellant may make hereafter to obtain the clay deposits on this land in the event of the subsequent modification of Public Land Order No. 576 in so far as it relates to this land.

(Sgd) Mastin G. White
Solicitor.

ALASKA COMPILED LAWS ANNOTATED 1949

§47-2-78. Leases of school lands: Authority of Governor: Leases to conform to authority granted Territory. The Governor is hereby authorized to lease all lands surveyed and reserved for the support of the public schools in this Territory as provided in Section One of the Act of Congress, approved March 4, 1915, (Sec. 353, Title 48, USC; (§47-2-21 herein)) and all leases so made shall be in conformity with the authority granted the Territory in said Act. (L 1933, ch 101, §1, p. 184; CLA 1933, §1411.)

§47-2-79. Application for lease: Description of land and purpose. All persons desiring to lease any school lands shall make application therefor under oath, and in such application shall describe the land sought to be leased and the purpose and use to which the same is to be put. (L 1933, ch 101, §2, p 185; CLA 1933, §1412.)

§47-2-80. Fixing rental: Term: Disposition of proceeds. The Governor shall fix a reasonable rental for each such lease and shall likewise fix the term thereof, but no lease shall be for a longer period than ten years; the proceeds from all leases shall be paid to the Territorial Treasurer and by him be covered into the School Fund. (L 1933, ch 101, §3, p 185; CLA 1933, §1413.)

§47-2-81. Preparation of lease form: Contents. It shall be the duty of the Attorney General, when requested by the Governor, to prepare a form of lease which shall contain the usual covenants and condi-

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§47-2-81. Preparation of lease form: Contents. It shall be the duty of the Attorney General, when requested by the Governor, to prepare a form of lease which shall contain the usual covenants and condi-

tions safeguarding the rights of the Territory and provide for the cancellation and forfeiture thereof in case of failure of the lessee to comply with any of such terms and conditions. (L 1933, ch 101, §4, p 185; CLA 1933, §1414.)

IN THE
United States Court of Appeals
For the Ninth Circuit

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a corporation,

Appellant,

vs.

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Appellee,

and

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE
D. SMITH, JR., LILLIAN E. SMITH, EUGENE E. SAX-
TON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON
and GRACE D. SAXTON, Co-Partners Doing Business
as the Northern Construction Association, and ELLS-
WORTH E. SAXTON, as Agent for Said Association,

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Upon Appeal from the District Court for the
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REPLY BRIEF OF APPELLANTS SCHUBERT, ET AL.,
DOING BUSINESS AS THE NORTHERN CONSTRUCTION
ASSOCIATION, AND ELLSWORTH E. SAXTON,
AS AGENT FOR SAID ASSOCIATION.

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PAUL P. O'BRIEN
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No. 14,190

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ASSOCIATION, AND ELLSWORTH E. SAXTON,
AS AGENT FOR SAID ASSOCIATION.

A detailed analysis of the briefs of the two appel-
lants and the brief of appellee, discloses only four

points of controversy. Appellants contend that the following four statements are correct and that therefore the decision of the lower Court should be reversed. The appellee, Territory of Alaska, contends that the statements are not correct.

1. Sand and gravel are minerals, subject to placer location under the mining laws of the United States.

2. The determination of the mineral character of the land here involved is solely for the determination of the Land Department of the United States, and not for the Court in this proceeding.

3. The Materials Act did not remove the lands here involved from the operation of the mining laws of the United States.

4. The failure of the Secretary of the Interior to make rules and regulations under the Act of August 7, 1939, 53 Stat. 1243, does not invalidate the placer mining locations of appellants.

1. SAND AND GRAVEL ARE MINERALS, SUBJECT TO PLACER LOCATION UNDER THE MINING LAWS OF THE UNITED STATES.

The Territory of Alaska admits at page 3 of its brief that the placer mining claims of the appellants are valuable deposits of sand and gravel.

But the Territory states it was not the intent of Congress to include sand and gravel within the scope

of the word "mineral", that sand and gravel are not recognized as minerals by standard authorities on the subject, and that sand and gravel do not meet the dictionary definition of "mineral" in that they are a heterogenous mixture without a definite chemical composition. The Territory bases its reasoning upon *Zimmerman v. Brunson* (1910), 39 L.D. 310 and *U. S. v. Aitkin, et al.* (1913), 25 Phil. 7. The Territory rejects as unsound the later cases, holding that sand and gravel are minerals under the mining laws: *Loney v. Scott* (1910), Oregon, 112 P. 172; *Layman v. Ellis* (1929), 52 L.D. 714, overruling *Zimmerman v. Brunson*; *Opinion of the Acting Solicitor* (1933), 54 L.D. 294, and *U.S. v. Barngrover* (1942), 57 L.D. 533. These cases authoritatively answer the contentions of the Territory in every particular. It must be remembered that in 1872, when the mining laws were passed, sand and gravel may not have been valuable minerals such that the property containing them would be more valuable for its minerals than for its agricultural potential. Even in 1910, when the Land Department first held on the subject, the value of sand and gravel generally had not yet been realized. However, by 1929, when the Land Department finally held that sand and gravel were minerals, the really great potential of sand and gravel in trade and commerce was finally being realized. To logically follow the contention of the Territory that Congress did not intend to include sand and gravel as minerals, it would be necessary to conclude that radium and uranium are not minerals because, if they were known at all in

1872, they were known only to the experimental chemist and had no value in trade and commerce. It is entirely more logical to presume that the mining laws were passed as general law establishing a standard to be applied to changing conditions over a long span of years and were not intended to limit the mining laws to then existing chemical, physical and economic interpretations.

Each deposit of sand and gravel has a definite chemical composition, but each deposit varies in some particular from every other deposit. Sand and gravel are no more heterogeneous than coal and oil, both of which are minerals.

2. THE DETERMINATION OF THE MINERAL CHARACTER OF THE LAND HERE INVOLVED IS SOLELY FOR THE DETERMINATION OF THE LAND DEPARTMENT OF THE UNITED STATES, AND NOT FOR THE COURT IN THIS PROCEEDING.

The Territory has attempted to make the determination of whether or not valuable deposits of sand and gravel are "mineral" a matter of law to be decided by the Court, apparently under the assumption that the Courts must decide in the first instance whether a substance is "mineral" and that the Land Department is limited to a decision as to whether or not a particular deposit of that "mineral" is of sufficient quantity and quality to render the land containing the deposit open to occupancy and purchase under the mining laws.

Although the mining laws have been in effect since 1872, there is no reported decision supporting the contentions of the Territory. All reported decisions are to the effect that, except in cases of fraud, the determination of the Land Department as to the mineral or non-mineral character of lands is final and conclusive on the Courts. The Supreme Court terms the Land Department a "legislative court" (*Crowell v. Benson*, 285 U.S. 22, 50), and Congress has not given the judicial department either concurrent or appellate jurisdiction over that "legislative court".

3. THE MATERIALS ACT DID NOT REMOVE THE LANDS HERE INVOLVED FROM THE OPERATION OF THE MINING LAWS OF THE UNITED STATES.

Neither the express language of the Materials Act, nor the legislative history of this statute lend any support to appellee's contention that by this passage Congress evinced an intent that sand and gravel be not subject to mineral claims. On the contrary, as was shown in appellants' brief, at pages 16-19 (see also Appellants' Appendix, at pages 10-32), the Materials Act both by express proviso and other legislative acquiescence in contemporaneous administrative construction, clearly evinced a Congressional intent to treat sand and gravel in the same manner as any other minerals. Thus, this substance would be subject to disposition under the Materials Act, in those cases where because of its marginal character and lack of

value it could not be successfully claimed for mining purposes.

This view is confirmed not only by the statutory language, the legislative history and the decisions cited in appellants' brief, but also by the most recent regulations of the Department of Interior contained in Title 43, Code of Federal Regulations, Section 259, as amended by Circular 1758 (15 F.R. 4081, June 24, 1950). Subsection 259.1 summarizes the general authority for the disposal of material, including sand, stone and gravel. Subsection 259.3 is entitled "Disposals which must be made under other statutes; rights under other statutes".

Paragraph (d) reads as follows:

"Sand, stone and gravel of such quality and quantity as to be subject to the mining law will not be disposed of under the Materials Act."

The long line of decisions cited in appellants' brief (at pages 5-14) has firmly established what constitutes sand and gravel or any other mineral "of such quality and quantity as to be subject to the mining law" as that which when found any place makes the land more valuable for mining than for agriculture and which, when present in such quality and quantity as to justify a reasonably prudent man in making the expenditures necessary to commercial mining operations, will support a claim for a mineral patent to the land. Neither the Courts nor the Land Department have departed, either before or after the enactment of the Materials Act, from this old established rule.

4. **THE FAILURE OF THE SECRETARY OF THE INTERIOR TO MAKE RULES AND REGULATIONS UNDER THE ACT OF AUGUST 7, 1939, 53 STAT. 1243, DOES NOT INVALIDATE THE PLACER MINING LOCATIONS OF APPELLANTS.**

The pertinent portion of the Act of August 7, 1939, 53 Stat. 1243, is the last sentence:

“The Secretary of the Interior is hereby authorized to make all necessary rules and regulations in harmony with the provisions and purposes of this Act for the purpose of carrying the same into effect.”

The Secretary of the Interior did not make any rules and regulations; and, specifically, did not make any rules or regulations relating to compensation to Territorial lessees for damage to crops or improvements by the mineral claimant.

While appellants recognize that a mineral occupant might cause damage to a surface lessee in some locations, under some circumstances, there is no contention here that any damage has been or will be caused to the surface lessees of the acreage here involved. The record (R. 53) shows that the Alaska Road Commission and a private corporation removed gravel from the land with the permission of the Territory and the lessee. Therefore, it is not shown that any rules and regulations were necessary.

No objection has been heard from any of the lessees involved.

The truth of the matter is that the enormous quantities of gravel available on the lands in question, and the limited surface use by Territorial lessees, obviate

any possibility of interference with the use of the surface by the lessees during the limited term of the leases.

Dated, Anchorage, Alaska,
September 20, 1954.

Respectfully submitted,

E. L. ARNELL,

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*Attorneys for Appellants Northern
Construction Association and
Ellsworth E. Saxton, Agent.*

IN THE

United States Court of Appeals
For the Ninth Circuit

SUPERIOR SAND AND GRAVEL MINING CO., INC.,
a corporation,

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TERRITORY OF ALASKA,

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FILED

AUG 17 1955

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E. SAXTON, AS AGENT FOR SAID ASSOCIATION.**

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

FOREWORD.

The decision of the trial Court was to the effect that sand and gravel were not minerals under the mining laws of the United States. Upon appeal, this point was mentioned but not decided or discussed. The judgment of the trial Court was affirmed for the following reasons:

“We are of the opinion that Congress can not be held to have intended the 1939 legislation to become effective as to lands under existing lease in the absence of the contemplated administrative regulations for the safeguarding of the interests and the protection of the rights of those holding under the Territory. A less stringent construction would tend, as this case amply demonstrates, to thwart the purpose which the Congress had in mind in setting apart these lands for the benefit of the territorial common schools. The statute, unclear as it is, must be interpreted in such manner as to effectuate its purposes, not to circumvent them. Accordingly we hold that the land was not open to mineral entry at the time appellants’ locations were made, hence the locations are invalid.”

Thus, the decision of this Court appears to be based upon a combination of statutory construction, Congressional intent, and public policy.

GROUND S FOR REHEARING.

Appellants seriously contend that this Court failed to ascertain the true public policy involved or the true intent of Congress and has therefore failed to correctly interpret the statute involved. By its decision this Court has overruled an unbroken chain of Supreme Court cases extending over almost a century which clearly sets forth the public policy and defines the Congressional intent and purpose with regard to mineral lands included in school reservations or grants.

ARGUMENT.

The grant of Sections 16 and 36 in each section as school lands has never been an immediate grant of all such sections exclusive of reservations or restrictions. Grants to states have generally specifically excluded mineral lands: two principal exceptions to this statement are the grants to California and Utah. Even in the case of these two states the United States Supreme Court held that the grants did not include known mineral lands even though the states or their successors in interest had dealt with the lands as their own for many years (appellants' brief, pp. 33-34). An examination of these cases clearly shows that in granting school lands Congress intended to reserve known mineral lands from the grant for distribution under the mining laws even though it did not say so in the grant and even though the usual rules of statutory construction would normally result in a different conclusion. See particularly *United*

States v. Sweet, 245 U.S. 563. This is a long case and should be read in its entirety. It sets forth the history of the mineral versus school reserve conflict and clearly defines the public policy and Congressional intent and purpose as favoring the development of mines and mining at the expense of school reserves. When necessary to make a grant conform to this declaration of intent and policy, the Supreme Court read into the granting act a reservation of known minerals. This is absolutely opposite to the decision of this Court as to the Congressional purpose. It is to be noted that in the case of California and Utah the statute made an absolute grant, whereas in the case now before the Court there is merely a statutory reservation which may or may not ripen into a grant at such time as Alaska may become a state.

Congress, for almost a hundred years, has regarded the use of lands for mining purposes as of more benefit to the nation as a whole than the reservation of lands for school purposes. In the opinion of appellants, this was a wise decision, for the development of trade and commerce results in more financial benefit to the schools through taxes assessed upon the land involved and through increased tax returns from the development of the adjacent area than would result from the short term rental of school lands which precludes extensive economic development of the lands. Congress has preferred the validity of the claim of the mineral claimant over that of the state to school lands. In the case now before the Court, this Court

may take judicial notice of facts of common knowledge: The lands in question are within the boundaries of the Anchorage Independent School District and also of the City of Anchorage; each of these governmental units levies an annual 10 mill tax; the resulting tax on the two million dollar valuation (appendix to appellants' brief, page 3) would be \$40,000 per year, which is more than the Territory has been able to derive from all the rentals on all reserved school lands since the passage of the 1915 Act.

Incidentally, the Territory is entitled to select other lands in lieu of the land in question.

“* * * And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections 16 or 36 are mineral land * * *” 43 U.S.C.A. Sec. 851.

“The lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character * * *” 43 U.S.C.A. Sec. 852.

These two sections further indicate a policy on the part of Congress to exclude mineral lands from school grants.

The historical development of legislation dealing with Alaska school lands clearly shows that the public policy and Congressional intent as defined in the *Sweet* case, supra, culminated in the passage of the 1939 amendment. The original 1915 Act reserved Sections 16 and 36 in each township in Alaska, not known to be mineral in character, from sale or set-

tlement for the support of the common schools, and gave the Territory the right to lease the land for periods not to exceed 10 years. This enactment failed to permit anyone, including the Territorial schools, from deriving any benefit from the later discovered minerals, from the timber on the land, or from any other materials on the land which might have some economic value. Since the 1915 Act limited Territorial leases to 10 years, the only possible source of income for the Territorial schools was from leases for agricultural purposes. It is a matter of common knowledge that very little of Alaska, whether school land or otherwise, is suitable for agricultural purposes and therefore the result of the 1915 Act was to prevent the Territorial schools from deriving any substantial benefit from the 1915 reservation. To correct this situation, Congress enacted the 1939 amendment. In effect the 1939 amendment provided that if the reserved school land contained valuable timber, the timber could be sold, if it contained coal or oil, or other minerals subject to the mineral leasing laws, it could be leased, if it contained other types of valuable minerals it was subject to disposition under the general mining laws. In any event, all the income would go to the Territory for school purposes. Congress, by the 1939 amendment, opened the door to mineral locations and placed Alaska school lands on a par with school lands in the various states—in each state school lands were subject to mining location unless the lands were not known to be of mineral character at the time of the actual grant (not at the time of earlier reservation prior to statehood).

In the light of the Congressional intent and purpose and the public policy outlined in the *Sweet* case, the 1939 amendment requires no strained construction. It then becomes perfectly clear. It is then apparent that if the crops or improvements of the Territorial lessee will be damaged by the mining operation, the mining operation cannot be conducted until compensation has been provided, but if mining operations can be conducted without injury to the crops or improvements of the Territorial lessee during the remainder of the term of his lease, as in this case, then the mining operation may continue. The authority of the Secretary of the Interior "to make all necessary rules and regulations" is permissive rather than mandatory—if he finds that rules and regulations are necessary he has the authority to make them. Since the rule making is permissive only, it cannot be a condition precedent to the validity of a mining location. It would be impracticable to require compensation to the lessee prior to discovery and location because the extent of compensation would be impossible to determine.

There was clearly no necessity for rules and regulations or the imposition of any conditions providing for compensation in this case at any time. The placer mining claims of appellants were located in October, 1950; application for patent was filed in the United States Land Office August 21, 1952. The complaints of the various adverse claimants were filed in the trial Court in the first quarter of 1953. At no time since the location of the placer mining claim has any Territorial lessee objected to the use or occupancy of

the lands by appellants; in fact, the record discloses from the uncontradicted testimony of appellants' witness (R. 71-77) that the Territorial lessees were making very limited use of the lands in question, so limited that the removal of sand and gravel by appellants from the unused portions could not conceivably have interfered with or damaged any crops or improvements of the Territorial lessees. Mining operations might have interfered with some future contemplated use, but the 1939 Act does not provide for compensation for loss of future contemplated use.

Therefore, no loss by any Territorial lessee being shown or even claimed, no objection having been made by any Territorial lessee to the use of the lands in question by the appellants, and no interference with or damage to any crops or improvements of any Territorial lessee being conceivably possible under the limited term of the leases, there was no necessity for rules or regulations by the Secretary of the Interior.

Wherefore, appellants respectfully request that a rehearing be granted in this cause.

Dated, Anchorage, Alaska,
August 12, 1955.

Respectfully submitted,
E. L. ARNELL,
VERNE O. MARTIN,
Attorneys for Appellants and Petitioners
Northern Construction Association and
Ellsworth E. Saxton, Agent.

CERTIFICATE

I, Verne O. Martin, one of the Attorneys for Appellants Northern Construction Association and Ellsworth E. Saxton, Agent, do hereby certify that in my judgment this Petition for Rehearing is well founded and I do further certify that the said Petition is not interposed for delay.

Dated, Anchorage, Alaska,
August 12, 1955.

VERNE O. MARTIN,





